

No. 3666.

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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Big Sespe Oil Company, a Corpora-  
tion,

*Appellant,*

*vs.*

William H. Cochran, a Citizen of the  
State of New York, and

William H. Cochran as Trustee for  
Pacific Crude Oil Company,

*Appellees.*

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BRIEF ON BEHALF OF APPELLANT.

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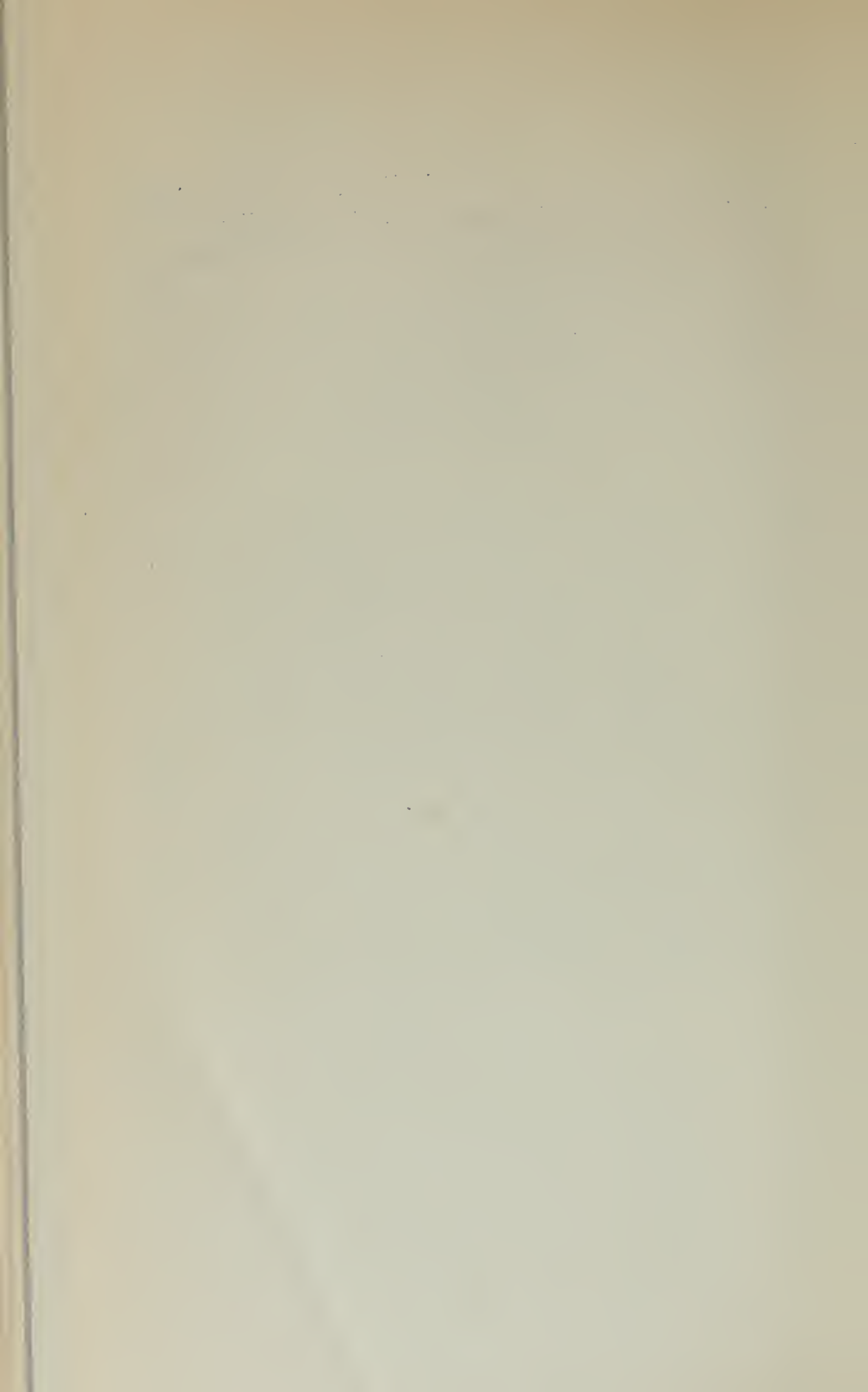


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NOTE.—Figures herein in parentheses refer to transcript pages.

I.

ABSTRACT OF THE CASE.

INTRODUCTORY:

This is an appeal from a final decree in equity pursuant to a bill filed by an individual, William H. Cochran, as an alleged citizen of the State of New York,

against the appellant, Big Sespe Oil Company, a California corporation, and one E. G. McMartin, as sheriff of the County of Ventura, State of California, alleged citizens of the State of California. This appeal was taken and is prosecuted by Big Sespe Oil Company, a corporation, alone; an order of severance authorizing a separate appeal by this appellant having been obtained and entered in the lower Court (509).

This suit concerns and the final decree affects the title to, the right to the possession of, and the right to and the proper disposition of certain rents and profits of certain real property, situated in the County of Ventura, State of California, which has been operated for upwards of ten years in the development and production of oil thereon and therefrom.

The suit found its way into the Federal Courts solely by reason of the alleged diversity of citizenship of the parties thereto.

### **History of the Litigation and Circumstances Surrounding Same.**

A brief statement of the facts out of which this controversy arose is here appropriate.

On March 30, 1914, and for several years prior thereto, this appellant was the owner of the real property the title to which is involved in this action. This property was on said last mentioned date an oil producing property, having four oil wells, with their machinery and equipment thereon (Test. Hornada. 132).

On said last mentioned date, for a consideration, part of which was money, paid by and for Pacific Crude Oil Company, a Delaware corporation, this appellant, by its two deeds (Plff's Ex's 5 and 6, 557-568 inc.), transferred and conveyed said real property, the grantee and transferee in said deeds being named and designated therein as "William H. Cochran, Trustee for Pacific Crude Oil Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware." The William H. Cochran in said deeds mentioned, is the same person who, in his individual capacity, is the complainant herein, and who, "as Trustee for Pacific Crude Oil Company, a corporation," is the intervenor herein.

No instrument in writing, other than said two deeds, creating or declaring or evidencing any trust in said real property appears anywhere in the record of this suit. Indeed, the evidence, as will be hereinafter shown, shows that there never was any such writing other than said two deeds.

Subsequent to the execution and delivery of said deeds, a suit was brought in the Superior Court of the State of California, in and for the County of Ventura, by this appellant as plaintiff against said Pacific Crude Oil Company, a corporation, and said William H. Cochran as Trustee for said Pacific Crude Oil Company, as defendants. On the 2nd day of January, 1917, a judgment was docketed and entered in said cause in favor of the plaintiff therein and against

Pacific Crude Oil Company, a corporation, *alone*, for the sum of seventeen thousand, six hundred forty and 50/100 dollars (\$17,640.50). (6, 80, 81.) Execution issued on said judgment on February 2, 1917, and on March 3, 1917, the sheriff of said County of Ventura, under and by virtue of said execution, sold to this appellant, and this appellant purchased for the sum of \$17,340.50 all the right, title, interest, claim and estate of said judgment debtor, Pacific Crude Oil Company, a corporation, of, in and to the real property described in complainant's bill and involved in this suit. On March 3, 1917, a Sheriff's Certificate of Sale was issued and delivered to this appellant as such purchaser. (See Shffs. Ctf. 553.)

One of the vital questions arising on this appeal is what, if any, title or interest did the Pacific Crude Oil Company own or possess in or to said real property at the time of this sale, and what, if any, title or interest did this appellant, as such purchaser, acquire by said execution sale to it of all the right, title or interest of said last named corporation in or to said property?

After said sale and the issuance and delivery of the sheriff's certificate of sale, the person who had been in charge of the property for the former owner took charge of the property on behalf of this appellant as the purchaser at said sale (Test. Hornada. 133). This appellant continued in said possession, operating the property and the wells thereon, making many repairs and improvements thereon at great cost to it, and dis-

posing of the oil produced therefrom up to the present time. The record fails to show that any force or threats whatever were used in taking this possession, and fails to show that any resistance or objection, of any kind, was offered to the taking of said possession or to the continuance thereof or the operation of said property by this appellant prior to the commencement of this suit. Indeed, during the whole of the year immediately succeeding the execution sale the complainant, Cochran, continuously discussed with the officers of appellant the operations and activities of appellant on the property, and made no objection whatever thereto, but acquiesced therein by requesting a statement of the moneys received and the expenses incurred in the operation of said property for the avowed purpose of ascertaining what moneys were necessary to redeem from said sale. (Test. Cochran, 122-124 inc.)

Furthermore, after the refusal to give such requested statement of receipts and expenditures to said Cochran on the ground of his lack of authority to demand the same, which occurred on or about March 1, 1918, within two days of the close of the period for redemption, no objection or protest against the continued possession and occupancy and operation of the said property by the appellant, and no demand for possession thereof was made during the period of about fifteen months which then elapsed before the commencement of the present action. The effect of this acquiescence and of these acts and conduct of the

complainant is of vital importance on this appeal, not only as relevant to the issue of laches as raised by the answer herein but also in its bearing upon the question as to whether this appellant was, in said possession and occupancy, a willful trespasser as was held by the Special Master and the lower Court. Notwithstanding the facts as above set forth, said Special Master and the Court held that this appellant in entering into such possession of said property and in operating the same was a *willful trespasser* (See Mem. Opin. Spec. Mast. 408; Inter. decree. Par's 6 and 8. 374-375), and enforced against it the strict and harsh rule which precludes such a trespasser from claiming or being allowed any credit whatever for services performed or expenses paid or incurred in connection with the operation of the property and the producing of the revenue therefrom, and compelled it to account for every dollar of the proceeds produced by its labor and expense without allowing any credits or deductions whatever, except the amount paid for State and County taxes on said property.

This holding was based solely on the finding by the Court (Inter. Dec. Par. 6. 374), that Pacific Crude Oil Company, as judgment debtor, had no right, title or interest in said property ~~by said execution sale,~~ the legal title being in a stranger to the judgment, to-wit, William H. Cochran, as Trustee for Pacific Crude Oil Company, and that he alone was entitled to possess and operate the property, and the possession and operation thereof by appellant was, therefore, a willful

trespass and wrongful. In this conclusion, the Court in our opinion committed serious and fatal error.

As hereinbefore stated, the possession of defendant and its operation of the property continued uninterrupted and without opposition or objection after said execution sale. On March 1, 1918, two days prior to the end of the period allowed by the laws of California for the redemption of said property from the effect of said execution sale, there was served upon appellant, and also upon said sheriff, a written demand (copy attached to bill of complaint herein 27) signed, "Pacific Crude Oil Company by William H. Cochran, its attorney—William H. Cochran, as trustee for Pacific Crude Oil Company—William H. Cochran." This demand recites the issuance of the execution above referred to, the sale by the sheriff under said execution of March 3, 1917, the issuance of the certificate of sale, the receipt by this appellant of certain rents or profits from the said real property sold under execution, and that said property is subject to redemption under the laws of California and the aforementioned rents and profits so received by appellant are a credit upon the money necessary to be paid to make such redemption. These recitals are followed with a notice that under and pursuant to the provisions of section 707 of the Code of Civil Procedure of California and of the other laws applicable thereto, "Demand in writing is hereby made upon you, as the aforementioned purchaser, and also as judgment creditor, that you make, give and deliver a written and verified state-

ment of the amounts of such aforementioned rents and profits, thus received by you as aforesaid. Said statement should be served on William H. Cochran, care of Angelus Hotel, Los Angeles, California. Dated: Los Angeles, March 1, 1918.”

This appellant neglected and refused to comply with said demand on the ground and for the reason that the said judgment debtor, Pacific Crude Oil Company, had not made or signed the demand or authorized its making, execution or service.

Nothing further appears to have been done in this connection until the 23rd day of July, 1918, when this appellant brought an action in the Superior Court of the State of California in and for the County of Ventura against the said sheriff of said County, in which action it sought and obtained a peremptory writ of mandate compelling the said sheriff to make, issue and deliver to this appellant as the purchaser at said execution sale his, said sheriff's, deed conveying the title purchased by this appellant to said real property at said execution sale to this appellant as such purchaser. On August 29, 1918, the said Superior Court duly and regularly made and entered its judgment in said proceeding, granting and awarding to this appellant a peremptory writ of mandate against said sheriff compelling the issuance and delivery of said aforementioned deed. The complainant herein was fully advised of, had personal knowledge of, and took part in said proceedings in said Superior Court, going so far as to consult with and advise the attorney for said sheriff

in said proceedings concerning the defense thereto. (Test. of Robt. M. Sheridan, 109-116 inc.; Test. of Cochran, 116-118 inc.) The record is silent as to any attempt by the complainant either as an individual or as trustee, or by said Pacific Crude Oil Company, to intervene in said action. On August 29, 1918, the said sheriff issued and delivered to the appellant his said sheriff's deed conveying to appellant all of the right, title and interest of said judgment debtor, Pacific Crude Oil Company, a corporation, of, in or to said real property.

The record fails to show anything further having been done by complainant or by said Pacific Crude Oil Company until July 2, 1919, when the present suit was commenced.

It will thus be noted that the right of this appellant to the possession and occupation of the property which was initiated as aforesaid by said execution sale on March 3, 1917, was not in any way objected to or interfered with, or even questioned, until July 2, 1919, a period of over two years, and notwithstanding the refusal to give said demanded statement of rents and profits on March 1, 1918, a period of sixteen months was allowed to elapse before the commencement of any suit or the definite assertion in any positive manner of any claims of right or interest in or to said real property or the rents and profits thereof by or for said Cochran, or by or for said Pacific Crude Oil Company.

### THE PRESENT SUIT:

In the bill of complaint (4) this suit is entitled as one "To Redeem Real Property". It was brought by complainant, William H. Cochran, *in his own individual right*, as the assignee of the judgment debtor, Pacific Crude Oil Company, a corporation of the State of Delaware, for the purpose and with the object of allowing said assignee, in his own individual right, to redeem said property from the effect of the judicial sale by the sheriff of Ventura County under the writ of execution, based upon the judgment in favor of this appellant and against said Pacific Crude Oil Company, all of which has been hereinbefore referred to.

The complainant bases his right to sue for the relief demanded, viz., the right to redeem said property, with an incidental right to an accounting for the rents and profits thereof, solely upon a written assignment (Com's Ex. 8, 569), purporting to be executed by said Pacific Crude Oil Company after a time when it had forfeited its charter under the laws of Delaware (see Inter. Dec. 379). This assignment purports to assign to complainant, who was still the trustee for said company, *not any right, title or interest in the property involved*, but solely the right to redeem the same from the effects of said sale. The authority of the persons purporting to execute said instrument for said corporation to execute the same or to bind the company as well as the legal sufficiency of said assignment to vest in complainant the right to redeem said property

or to bring this suit was disputed and challenged in the lower Court and is involved in this appeal.

The suit was based primarily upon the provisions of the Code of Civil Procedure of the State of California relating to the redemption of real property sold under execution, and in particular upon the provisions of sections 700-707, inclusive, of said Code. Incidental to the main relief asked, the complainant, basing his rights upon said section 707 of the Code of Civil Procedure, sought to obtain an accounting and settlement of the rents and profits of said property received by this appellant during its possession of the same, subsequent to said sale; and also, and incidental to the main relief asked, complainant sought to have the deed of said sheriff to this appellant, as the purchaser at said execution sale, decreed to be void and cancelled.

A motion to dismiss was filed, argued and overruled, and an answer raising certain issues was thereafter filed. The case was tried on the equity side of the Court, by the Court, without a jury, with the result that an interlocutory decree was made and entered therein finding and adjudging, among other things, that at the time of the docketing of the judgment in said action in the Superior Court of said Ventura County, in favor of this appellant and against said Pacific Crude Oil Company, and also at the time of said execution sale, to-wit, March 3, 1917, the legal title to the real property sought to be redeemed from the effect of said sale, "was vested in and was held by William H. Cochran, as trustee for Pacific Crude Oil

Company, the aforementioned judgment debtor, and had been continuously so vested and held since the 30th day of March, 1914; and that at the said times, the said judgment debtor, Pacific Crude Oil Company, neither had nor possessed any estate or any interest in the said real property, but had and possessed solely the right to enforce the provisions of the trust in connection therewith against the said Trustee." (374-375)

This interlocutory decree further found and adjudged that complainant was entitled to the relief he sought, namely, the right to effect the redemption of said real property from the effect of said sheriff's sale, and the matter was referred to a Special Master for an accounting and disclosure by this appellant, as such purchaser, of such moneys, rents and profits as it had collected and received from the said real property since March 3, 1917.

The matter was heard by said Master and his report, subsequently made and filed with the Court, found and adjudged the gross receipts obtained and received by this appellant from the operation of said property and the sale of oil therefrom, and recommended that it should account for the whole of said gross receipts. Said Master in his report and findings further found that appellant in entering into possession of said real property and in operating the same was a *wilful trespasser* and therefore should account for every dollar received by it from or out of the operation of said property, without any credit or deduction whatever (except the amount paid for State and County taxes),

notwithstanding the fact that said Master also found that this appellant had expended various and large sums of money in the operation of said property and in the production of the oil therefrom, the sale of which oil resulted in the said gross proceeds above mentioned.

The report, findings and recommendations of said Master were subsequently received and approved in their entirety by the said Court. Said report and findings, as approved, and as finally confirmed in the final decree herein, stated that the gross proceeds received by appellant from the operation of said property during said possession, and for which it must account, amounted to \$24,054.11; that the amount required to redeem from said execution sale was \$20,210.27, leaving a surplus or balance of \$3,843.64 in the possession of appellant collected and received by it without right and for which it must account and pay over to the Clerk of the District Court within ten days from the entry of the said decree.

On the day set for the signing of the final decree and pursuant to a notice theretofore given, the complainant, not in his personal capacity, *but as trustee for the Pacific Crude Oil Company, a corporation*, was allowed to and did, over the objection of appellant, file his complaint of intervention in said case, and after the filing thereof, the final decree was signed and entered. In and by said final decree the court adjudges and decrees that the redemption sought for

has already been made; that appellant has no right, title or interest in or to the real property, or the fixtures and improvements thereon, or the personal property used in connection with the operation thereof; that the intervenor is entitled to the possession of said property, real and personal, and appellant is commanded to quit and deliver the said possession to said intervenor, and is also commanded to pay to the Clerk of said District Court the sum of \$3,980.12 (the surplus as found by said Master, with interest) within ten days from the date of the entry of said decree; and appellant is also enjoined from claiming any right, title or interest in or to the property.

The bill expressly alleges that the jurisdiction of the Federal Court was based solely upon the diversity of the citizenship of the parties thereto. The bill alleges and the answer denies that complainant was a citizen of the State of New York. No evidence was introduced for the direct purpose of proving this issue. The evidence fails to show diversity of citizenship between the parties. Indeed, the only reasonable inference to be drawn therefrom is that both complainant and defendants were citizens of the State of California. Hence the lower Court had no jurisdiction.

### The Questions Involved.

The questions involved which appellant purposes to argue in this brief are as follows:

#### POINT 1.

That the Pacific Crude Oil Company at the time of the execution sale owned the complete equitable title to the property and William H. Cochran was the mere trustee holding the naked legal title. Therefore, appellant, as the purchaser at said sale acquired the complete equitable title to the property, subject only to the right of said Pacific Crude Oil Company to redeem in the manner and within the time authorized by the laws of California. For this reason the interlocutory decree, the Master's report and the final decree, which are all to the contrary, are erroneous.

#### POINT 2.

That appellant as purchaser at said execution sale was entitled to the credits claimed by it on the accounting for expenses incurred in the maintenance and operation of the property; and that appellant was not chargeable with interest on the amounts received by it as proceeds of the oil sold; and the ordering of the monthly rests and monthly deductions from the amount required to redeem was improper. Holding of the court and master that appellant was a willful trespasser in the possession and occupation of said property and, as such, subject to the law governing willful trespassers was erroneous.

POINT 3.

The attempted demand for the statement of rents and profits made March 1st, 1918 was invalid and ineffectual for any purpose and that no authority for making such demand was established by the evidence.

POINT 4.

The purported assignment from the judgment debtor to complainant is inherently insufficient and ineffectual to transfer the right to redeem. Complainant was not the successor in interest to the judgment debtor in or to any part of the property.

POINT 5.

Said purported assignment is invalid because of the fiduciary relations existing at this date between the alleged assignor and assignee.

POINT 6.

Said purported assignment was not legally executed and the Pacific Crude Oil Company was not bound thereby.

POINT 7.

The Court had no jurisdiction because of the lack of diversity of citizenship between the parties.

A—Burden of proof was on complainant.

B—The evidence shows that complainant was a citizen of the State of California, of which state the defendants were citizens.

POINT 8.

The complainant or his assignor having for a period of sixteen months after the expiration of the period of redemption taken no steps to redeem, is precluded from maintaining this action by reason of laches.

POINT 9.

The interlocutory decree rendered herein in its terms is inconsistent with the Master's report as well as with the final decree confirming the same. The latter confers upon the Pacific Crude Oil Company and the complainant as its assignee, the right to redeem while the interlocutory decree specifically declares that the Pacific Crude Oil Company has not and never had any right, title or interest in said property. If this be true it never possessed the right to redeem and therefore could assign no such right.

POINT 10.

The intervention of William H. Cochran as trustee was improperly allowed and this allowance was ineffectual for any purpose.

A—The intervention was too late.

B—No sufficient opportunity given appellant to answer complaint of intervention.

C—If any issues raised thereby appellant entitled to trial by jury thereon.

D—In any event the intervenor had no interest in the subject matter of this action.

POINT 11.

The Court erred in restraining appellant from removing certain personal property belonging to said appellant from the property involved in this action.

POINT 12.

The Court erred in that portion of the final decree ordering appellant to deposit in court the sum of \$3,-843.84, together with interest thereon, as the alleged surplus of profits over amount required to redeem. Upon a proper accounting there was no surplus and there was no party before the court who was entitled to any surplus.

ASSIGNMENT OF ERRORS:

For the convenience of the Court we here print the assignments of error filed with the petition for the allowance of appeal, upon which appellant here relies and the questions above stated arise.

1. The Court erred in not holding that the bill of complainant, William H. Cochran, fails to state a cause of action in equity against the defendant Big Sespe Oil Company.

4. The Court erred in receiving the following testimony of the witness William H. Cochran upon direct examination, offered by and on behalf of the complainant, to-wit:

“By Mr. Martin:

Q. Please state what, if any, business relations or otherwise you have had with the Pacific Crude Oil Company mentioned in the pleadings in this case?

Mr. Robinson: That is objected to as calling for a conclusion of the witness. If it is intended to call for transactions with the corporation, the existence of the proper officers with whom he could transact business, it assumes that he transacted business with the corporation. He might say that he transacted business with the corporation and it might not be business with the corporation at all. He might transact business with a person purporting to act for the corporation, but there is no foundation laid to show that any person had authority to act for the corporation in transacting business with him.

The Court: The objection is overruled.

A. Well, to fully explain my relationship with the Pacific Crude Oil Company I have to go back to February, 1914. I was coming to California—particularly Los Angeles—in February, 1914—

The Court: The question may be too broad. I don't want to know anything about it except what may relate to this case.

Q. By Mr. Martin: Well, I will add to that question: Are you acquainted with the officers of the Pacific Crude Oil Company?

A. I was acquainted with the officers who were officers at the time of this assignment, if that is what you refer to.

Q. Yes, sir.

A. I was; yes, sir.

Q. Do you know who they are?

A. I know who they were then; I don't know who

they may be now. I have no reason for knowing they have changed.

Q. Do you know who they were at the time of the execution of this instrument?

A. I do.

Q. The last instrument offered in evidence, this assignment to you.

A. I do.

Q. Will you tell the Court who they were.

Mr. Robinson: Objected to as calling for a conclusion of the witness and not the best evidence.

The Court: Well, strictly speaking, the records of the company would be the best evidence. I will let the witness testify who was acting as president of the company at the time of the execution of this instrument in June, 1919.

A. At that time George Van Hook Potter was president, and I think it is C. Duplaine was secretary.

Q. By the Court: Was anybody else acting as president or secretary at that time, of this corporation, or pretending or claiming to be?

A. No, there was not.

Q. Are you familiar with the seal of the corporation?

A. I am.

Q. How long have you known it?

A. Well, I have actually seen impressions of it for some—early in 1914, and then later on I repeatedly saw the actual seal.

Q. By Mr. Martin: What, if any, knowledge have you as to the execution of that instrument—this assignment to you of the right of redemption by the Pacific Crude Oil Company, by the officers of that Company?

Mr. Robinson: That is objected to as assuming a fact not in evidence, and calling for a conclusion of the witness, and on the ground that no proper foundation has been laid to show who the officers of the corporation were.

Mr. Martin: I asked him what, if any, knowledge he had.

The Court: The objection is overruled.

Mr. Robinson: Exception.

A. I saw both Mr. Potter and Mr. Duplaine sign and execute that instrument, and I saw the seal attached to it, and I also heard it acknowledged, and it was then delivered to me.

Q. By the Court: That is an impression of the seal of the corporation attached to this instrument, is it?

A. Yes, sir; it is.

Mr. Robinson: Will Your Honor grant us an objection and exception to the question as to the authenticity of the seal?

The Court: Certainly; the objection will be overruled.

Mr. Robinson: Exception."

5. The Court erred in receiving the following testimony of the witness William H. Cochran upon direct examination, offered by and on behalf of the complainant, to-wit:

Q. Who were the officers of this Pacific Crude Oil Company at the time the suit was commenced in 1914, as you have stated?

The Court: The Ventura suit?

Mr. Martin: Yes, sir.

Mr. Robinson: That is objected as not the best evidence, and as incompetent, irrelevant and immaterial.

The Court: The objection is overruled.

Mr. Robinson: Exception.

A. At that time C. C. Duplaine was president, and a gentleman by the name of Tibbets was secretary and treasurer, and the general counsel for the company was Charles H. Burr, and those officers were directors of the company, and my recollection is that the other directors at that time were a Mr. Jackson and a Mr. Taylor."

6. The Court erred in receiving the following testimony of the witness William H. Cochran upon direct examination, offered by and on behalf of the complainant, to-wit:

"By Mr. Martin:

Q. And who were acting as the officers of this company, the said company, on March 1, 1918?

Mr. Robinson: Objected to as calling for a conclusion of the witness.

The Court: The objection is overruled.

Mr. Robinson: Exception.

A. I stated this morning who they were. I stated this morning that the president was Mr. George Van Hook Potter and the secretary C. C. Duplaine, the two gentlemen who executed this assignment on the 11th of June."

7. The Court erred in receiving in evidence the following document marked in the records as Plaintiff's Exhibit No. 8, and being in words and figures as follows:

(See this document fully set forth verbatim in Plaintiff's Exhibit 8, admitted by District Court.)

8. The Court erred in finding and decreeing that ever since the sale at public auction on the 3rd day of March, 1917, as found and decreed in the second paragraph of the interlocutory decree in the above cause, of all the estate, right, title and interest which the Pacific Crude Oil Company, a corporation, in said paragraph described as the judgment debtor, had of, in and to the certain real property in said second paragraph described, all and every the aforesaid estate, right, title and interest of the said judgment debtor Pacific Crude Oil Company of, in and to the said real property ever has been and still is, as found and decreed in paragraph fifth of said interlocutory decree, subject to redemption by the said judgment debtor or its assignee, from the aforesaid sale thereof under execution.

9. The Court erred in not finding and decreeing that ever since the 4th day of March, 1918, the Pacific Crude Oil Company as judgment debtor did not have, nor did its assignee have any right of redemption of the property in the bill of complaint and in the second paragraph of the interlocutory decree described as having been sold on the 3rd day of March, 1917.

10. The Court erred in not finding and decreeing that the complainant William H. Cochran acquired and has by assignment from the Pacific Crude Oil Company, a corporation, or otherwise, no right of redemption of the aforesaid property from the aforesaid

execution sale to the defendant Big Sespe Oil Company.

11. The Court erred in finding and decreeing that such moneys, rents and profits as have been collected and received by the said purchaser Big Sespe Oil Company were, under the laws and statutes of the State of California relative thereto, a credit upon the money to be paid to redeem such property from such sale.

12. The Court erred in not finding and decreeing that no moneys except rents and profits collected and received by the said purchaser Big Sespe Oil Company were or ever have been a lawful or proper credit upon the moneys required to be paid to redeem such property from such sale.

13. The Court erred in finding and decreeing that before the expiration of the period of time ordinarily allowed under the laws of the State of California on redemption of such property, to-wit, within twelve (12) months after the aforesaid execution sale on March 3, 1917, the said debtor Pacific Crude Oil Company demanded in writing of the said purchaser Big Sespe Oil Company a written and verified statement of the amounts of rents and profits collected and received by said purchaser from said real property.

14. The Court erred in finding and decreeing that said written demand for a statement of the rents and

profits was made by, or with due or proper authority from, the party, if any, entitled to redeem.

15. The Court erred in finding and decreeing that said demand for a statement of the rents and profits was in due and legal form and as prescribed and required by the said laws and statutes or that in all particulars it was duly, properly, legally and equitably made.

16. The Court erred in finding and decreeing that by reason of the failure and refusal of the defendant Big Sespe Oil Company to give such demanded statement of the rents and profits, the right of redemption in said interlocutory decree mentioned and the period of time for such redemption was extended for and until the expiration of a further period of time which had not expired at the time of the commencement of this suit.

17. The Court erred in finding and decreeing that by that certain instrument in writing bearing date the 11th day of June, 1919, and hereinabove set out in Assignment of Error No. 7, the said judgment debtor Pacific Crude Oil Company sold, assigned, transferred and conveyed to the complainant William H. Cochran, its certain right of redemption in said interlocutory decree described and adjudged.

18. The Court erred in finding and decreeing that said instrument bearing date the 11th day of June, 1919, purporting to be an assignment from the said

judgment debtor, Pacific Crude Oil Company, to the complainant William H. Cochran, of its said right of redemption, was made, executed and delivered with due, proper and legal authority, or by any one having legal power or authority to execute the same.

19. The Court erred in finding and decreeing that the said instrument dated the 11th day of June, 1919, purporting to be an assignment from the said judgment debtor Pacific Crude Oil Company to the complainant William H. Cochran of its said right of redemption was and is sufficient to and actually did assign, transfer and convey unto the said William H. Cochran, the complainant in this suit, in his own right and for his own personal use and benefit, the aforesaid redemption and right of redemption in said interlocutory decree found and adjudged; and that thereby said William H. Cochran became lawfully seized and possessed of the right to make such aforementioned redemption in the form and manner prescribed by the laws and statutes of the State of California, in such cases made and provided, and for his own use and benefit.

20. The Court erred in finding and decreeing that since the said 11th day of June, 1919, the complainant herein, William H. Cochran, ever has been or still is entitled to make such aforementioned redemption or to institute and maintain this suit for the enforcement thereof.

21. The Court erred in finding and decreeing that this suit was commenced within the time limited for such suits by the statutes of said State of California relative thereto.

22. The Court erred in finding and decreeing that neither complainant nor said Pacific Crude Oil Company has been or is guilty of any laches, either at law or in equity, in the commencement of this suit, or in the making of the aforesaid redemption.

23. The Court erred in finding and decreeing, as set forth in paragraph thirteenth of said interlocutory decree, that a certain instrument in writing in said paragraph described, wherein and whereby E. G. McMartin, sheriff of the County of Ventura, State of California, purported to grant, bargain and sell unto the aforesaid purchaser Big Sespe Oil Company, all the estate, right, title and interest of the said judgment debtor Pacific Crude Oil Company, of, in and to the aforesaid real property in the bill of complaint, and in said interlocutory decree described, was and is void *ab initio*, and that the aforesaid purchaser Big Sespe Oil Company took nothing thereby on the ground that the same was made and given before the expiration of the period of time for the aforesaid redemption as hereinbefore found and adjudged.

24. The Court erred in finding and decreeing that said instrument or deed from said sheriff shall be surrendered, cancelled and destroyed.

25. The Court erred in finding and decreeing that after the forfeiture of its charter and during the term of three years thereafter, said Pacific Crude Oil Company, under and pursuant to the statutes of the State of Delaware, retained its officers and directors with all the authority theretofore possessed by them and each of them, and in not finding and holding that after the forfeiture of its charter and by reason of such forfeiture, and at the date of the execution of the aforesaid instrument of assignment dated June 11, 1919, the said Pacific Crude Oil Company, as a corporation, had not, nor had the officers of said Pacific Crude Oil Company, nor had the directors thereof, any of the authority thertofore possessed by them or either of them in connection with the affairs of said corporation, and particularly that they had not, nor did any of them have, any power or authority to execute or deliver the said instrument or assignment dated June 11, 1919, and hereinabove set out.

26. The Court erred in finding and decreeing that said Pacific Crude Oil Company was not required by any law or statute of the State of California to file in the office of the Secretary of State of said State of California, a certified copy of its articles of incorporation, or of its charter or of the statute or statutes of legislative or executive or governmental act or acts creating it, or any designation of any person to receive service of process for it in the said State of California.

27. The Court erred in finding and decreeing that said Pacific Crude Oil Company never did do any business in the said State of California, and that it never did enter the said state for the purpose of doing any business therein within the meaning, intent and purpose of the statutes of said State of California in such cases made and provided; and further and consequently, that said Pacific Crude Oil Company at no time was subject to the said statutes or any of them, nor to any of the requirements, penalties or disabilities thereby created and imposed.

28. The Court erred in finding and decreeing that the moneys collected and received by defendant Big Sespe Oil Company from its sales of crude petroleum from the above mentioned real property constitute rents or profits which said defendant has received from the said property since March 3, 1917, and in finding and decreeing that such moneys are to be credited upon the money required to be paid by complainant to make and effect a redemption adjudged to him as in said interlocutory decree set forth.

29. The Court erred in not finding and decreeing that the moneys collected and received by the defendant Big Sespe Oil Company from its sales of crude petroleum from said above mentioned real property were merely the basis of computing the rents and profits from the said real property from which should be deducted the expenses of operating said property,

in order to estimate the amount of profits or rents received by said defendant.

32. The Court erred in finding and decreeing that the unpaid item of six hundred dollars (\$600.00) for back pay to one Hornada mentioned and described in the report of the Special Master in Chancery in said cause, should not be credited to the defendant Big Sespe Oil Company as an expense incurred in the operation of said real property and to be deducted from the gross receipts in estimating the amount of rents and profits received, and that the evidence fails legally to show an agreement to pay the same to said Hornada.

33. The Court erred in finding and decreeing that the defendant Big Sespe Oil Company was a willful trespasser upon the property in question and is not entitled to be reimbursed by complainant for expenditures for repairs and operations of said property, and in not finding that such expenditures should be deducted as proper charges and expenses in the operation of said property by said defendant.

34. The Court erred in finding and decreeing that the sum of eight hundred ninety-six and 50/100 (\$896.50) dollars paid to one Clampitt as president and manager of defendant company, should not be credited as an expense included in the operation of said property and to be deducted from the gross receipts in estimating the rents and profits.

35. The Court erred in finding and decreeing that the erection of new derricks and replacing of pumping machinery and equipment were not necessary repairs, but were replacements voluntarily and unnecessarily made by the defendant Big Sespe Oil Company upon the said property.

36. The Court erred in finding and decreeing that the new water system upon said property was not essential to the operation thereof, and that the expense involved in putting in this water system was not a necessary expense.

37. The Court erred in finding and decreeing that the road described in subdivision "d" of paragraph VIII of the report of the Special Master in Chancery in said cause on pages 18 and 19 of said report was not a necessary repair nor essential nor necessary to the producing or marketing of oil extracted therefrom by the defendant Big Sespe Oil Company.

38. The Court erred in finding and decreeing that the installing of a new water system, the reconstruction of the old road, the placing of additional gauging tank on the property, the erection of the new derrick at well No. 1 and the drilling of well No. 5, were not necessary to the preservation of the property or the producing or marketing of oil.

39. The Court erred in finding and decreeing that the defendant Big Sespe Oil Company is not the owner

of the personal property upon the real estate involved in this action.

40. The Court erred in not finding and decreeing that the defendant Big Sespe Oil Company was and is the owner of said personal property, and that the use thereof entered into the production of the profit from said realty and said defendant should receive credit therefor.

41. The Court erred in finding and decreeing that the defendant Big Sespe Oil Company should be charged with interest at the rate of seven (7%) per cent per annum on the proceeds from the sale of oil from the time of their several respective payments.

42. The Court erred in finding and decreeing that the defendant should not be credited with any interest after April 1, 1918, upon the judgment on account of which redemption is sought to be made.

43. The Court erred in finding and decreeing that monthly rests in charging interest upon receipts should be made in taking the account adjudged in this action.

44. The Court erred in not finding and decreeing that it was a custom in the district where the real property in question is situated to fix the rental value of oil property at one-sixth ( $1/6$ ) royalty of the gross production, and that the only proper charge against the defendant Big Sespe Oil Company to be credited upon redemption is not to exceed one-sixth ( $1/6$ ) royalty.

45. The Court erred in not finding and decreeing that the defendant Big Sespe Oil Company, for the purposes of the accounting adjudged in this action, should not be treated as a trespasser, but should account, if at all, only for the rents and profits attributable to or actually received from the use of the realty.

46. The Court erred in approving and confirming the report of the Special Master in Chancery in the above-entitled cause in each and all of the respects and for each and all of the reasons heretofore allowed in assignments of error numbers 35 to 55, inclusive, and in overruling each and all of the exceptions of defendant Big Sespe Oil Company to the report of said Special Master.

47. That the Court erred in finding and decreeing that the total amount of the several sums of money which the defendant Big Sespe Oil Company is entitled to receive and be paid upon the redemption of the real property in question is the sum of \$20,210.27 and that such sum is the amount of the redemption money required to be paid to said Big Sespe Oil Company upon and to make and effect the said redemption; and in not finding that the sum which the said defendant Big Sespe Oil Company is entitled to receive and be paid upon such redemption is the sum of the original judgment, the sum of \$17,340.50, being the amount for which said real property was sold at execution sale on the 3rd day of March, 1917, together

with interest at the rate of one (1%) per cent per month on said sum until said redemption is made.

48. The Court erred in finding and decreeing that the amount of profits collected and received by the defendant Big Sespe Oil Company from said property is the sum of \$24,054.11, and in not finding that the total amount of the profits so collected and received by said defendant is the sum of \$4,008.33, being a one-sixth ( $1/6$ ) royalty upon the gross sales of crude petroleum from said property.

49. The Court erred in finding and decreeing that out of and from and by the said adjudged profits the said defendant Big Sespe Oil Company has been fully paid the aforesaid total redemption money, namely, viz., \$20,210.27, so required to be paid to it and upon and to make and effect the aforesaid redemption.

50. The Court erred in finding and decreeing that the money required to redeem said property and to which the defendant Big Sespe Oil Company, a corporation, was entitled, has been as alleged in said final decree or otherwise or at all fully paid, satisfied or discharged; and that the defendant Big Sespe Oil Company is or should be required to make, execute or deliver to the complainant William H. Cochran, a certificate of such aforementioned redemption in the form specified in said final decree or at all.

51. The Court erred in finding and decreeing that by such adjudged payment, or by such made and

effected redemption, mentioned in and adjudged in said final decree, all or any of the effect of said execution sale of March 3, 1917, was or is terminated.

52. That the Court erred in finding and decreeing that the complainant William H. Cochran was or is the assignee of said Pacific Crude Oil Company on the said sale, and further erred in finding and decreeing that as such assignee, or in any other capacity or at all, the said complainant was or is restored to all or any of the estate and rights of said Pacific Crude Oil Company, sold or on by said sale, or that as such adjudged assignee or in any other capacity, or at all, said William H. Cochran was entitled to or did effect a redemption of any estate or rights of said Pacific Crude Oil Company, of in or to the whole or any part of said real property described in the bill of complaint herein.

53. The Court erred in holding and decreeing that this defendant Big Sespe Oil Company, after the payment of the redemption money or at any time, had or still has or holds in its hands a balance or surplus from the said collected and received profits amounting to the sum of \$3,843.84, or any other sum whatever; and the Court erred in further holding and decreeing that this defendant Big Sespe Oil Company had no right to collect, receive and retain or hold said adjudged surplus profits or any part thereof, and in finding and decreeing that said defendant has not any right, interest or claim thereto; and the Court further

erred in ordering and decreeing that this defendant is required to or shall pay over to the Clerk of the District Court for the Southern District of California the sum of \$3,980.12, or any other sum.

54. The Court erred in finding and decreeing that that certain deed from E. G. McMartin, sheriff of the County of Ventura, State of California, to the defendant Big Sespe Oil Company described in paragraph seventh of the final decree, should be set aside, annulled and held for naught, and in setting aside, annulling and holding it for naught; and the Court further erred in ordering and decreeing that the defendant surrender up the said deed unto the Clerk of this Court to be by him cancelled and destroyed.

55. The Court erred in ordering and decreeing that the defendant Big Sespe Oil Company, its officers, employees, agents and attorneys, and each and every of them, or any of them, should be forever enjoined and restrained, and in enjoining and restraining them or any of them from asserting or setting up any claim or right whatsoever of any estate, right, title or interest in or to the premises described in the said instrument or in or to the personal property, buildings, machinery, equipment and fixtures therein or thereon, or to any of the income, rentals or profits from the said real property since the said 3rd day of March, 1917, by virtue of said execution sale and deed made in pursuance thereof.

56. The Court erred in ordering and decreeing that the defendant Big Sespe Oil Company, its officers, employees, agents and attorneys and each and every of them, or either or any of them, should be forever or at all enjoined and restrained, and in enjoining and restraining them or any of them from asserting or setting up any claim or right whatsoever of any estate, right, title or interest in or to the personal property, machinery and equipment upon the real property described in the bill of complaint herein.

57. The Court erred in ordering and decreeing that the defendant Big Sespe Oil Company shall forthwith or at all quit or surrender up to the intervening complainant herein, William H. Cochran, as trustee for Pacific Crude Oil Company, the aforementioned real property, together with all the personal property, buildings, machinery, equipment and fixtures therein and thereon.

58. The Court erred in ordering and decreeing that the defendant Big Sespe Oil Company shall forthwith or at all quit and surrender up unto the intervening complainant herein, William H. Cochran, as trustee for Pacific Crude Oil Company, the aforementioned personal property, machinery and equipment on said aforementioned real property, or any part or portion of any of said personal property, machinery or equipment.

59. The Court erred in ordering and decreeing that the complainant William H. Cochran have and recover

of the defendant Big Sespe Oil company his costs of this suit, or any costs at all; and the Court erred in ordering and decreeing that the compensation allowed to the Special Master or any compensation to said Special Master be charged against or borne by the defendant Big Sespe Oil Company, or that said Special Master shall be entitled to or have an attachment against the said defendant Big Sespe Oil Company for or on account of such or any allowed compensation, or at all.

60. The Court erred in allowing William H. Cochran, as trustee for Pacific Crude Oil Company, to intervene in said action, and in allowing and granting the petition of said William H. Cochran, as such trustee, for leave to intervene therein, and the Court erred in not finding and decreeing that the said petition for leave to intervene did not state facts sufficient to entitle said petitioner to intervene in said cause, and the Court erred in not sustaining the objections of the defendants to said petition for leave to intervene.

61. The Court erred in entering the final decree upon the complaint in intervention of the intervening complainant, William H. Cochran, as such trustee, without trial of the issues presented by his said complaint in intervention, and in making and entering a final decree based in part upon said complaint in intervention and granting to the said William H. Cochran, as such trustee, relief prayed for in said complaint, or any relief at all in this action.

62. The Court erred in finding and decreeing that the Pacific Crude Oil Company, a corporation, ever at any time had or possessed the right to redeem the real property described in the bill of complaint herein from the said execution sale thereof to this defendant mentioned and described in said bill of complaint; and the Court further erred in holding and decreeing that said Pacific Crude Oil Company ever at any time, by virtue of the purported assignment from said Pacific Crude Oil Company to said complainant, hereinbefore set forth and described, or by any other means or at all, sold or assigned or transferred or conveyed any right or privilege to redeem said property from said execution sale, and in finding and decreeing that said William H. Cochran, complainant, at any time had or possessed the right to redeem said property or any part thereof, from said sale or had at any time the right to commence or maintain this action.

63. The Court erred in making, in rendering and in entering the final decree and interlocutory decree in this cause, because and for the reason that the court, being a United States District Court, had no jurisdiction to render said final decree or any decree in said cause other than a decree dismissing the bill of complaint herein.

64. The Court erred in not finding and decreeing that it had no jurisdiction of this action or the subject matter thereof, and in not finding and decreeing that it had no jurisdiction to make, render or enter the

interlocutory or final or any other decree herein other than a decree dismissing the bill of complaint in said cause.

65. The Court erred in not finding and decreeing that it had no jurisdiction of this action or of the subject matter thereof, and in not ordering and decreeing a dismissal of the bill of complaint herein on the ground and for the reason that the evidence was insufficient to show that the cause of action was one between citizens of different states of the United States.

Assignments 30 to 49, inclusive, relate to rulings and finding of the Special Master set forth in his report (419 to 459). This entire report was approved and confirmed by the Court without alteration (360). This report was duly excepted to by appellant by its written exceptions (463 to 469, inclusive), eighteen in number, which specifically excepted to each of the matters involved in assignments 30 to 49, inclusive, above mentioned, and also generally excepted (469) to the basis and assumption upon said Master's report was founded, viz., that this appellant was a trespasser in the possession and occupation of said property and should be held accountable as such.

## ARGUMENT.

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### POINT 1.

**The Pacific Crude Oil Company at the Time of the Execution Sale Had all the Equitable Interest and Title in and to the Property Sold and William H. Cochran as Trustee Had No Interest Therein but Was Merely the Holder of the Naked Legal Title.**

Based on Answer, Para's IV and V (56), and XVI (64); Assignments of Error, 11 (517), 18 to 20 inc. (519), 23 (520), 32 (523), 33 (523), 34 to 38 inc. (524), 41 to 43 inc. (525), 45 and 46 (526), 47 to 51 inc. (526-527); also upon Inter. Dec. Pars. sixth and eighth (374-375), thirteenth (378); Final Decree, Para's first to eight inc. (498 to 503 inc.).

The interlocutory decree of the District Court (374) as well as the report of the Master (401), as confirmed by the Court, and the final decree rendered herein (498), rest upon the assumption that the judgment debtor, Pacific Crude Oil Company, at the time of the execution sale on March 3, 1917, possessed no estate or interest in the real property sold at such sale. The interlocutory decree declares in paragraph "sixth" thereof (374), "that at the said times, the said judgment debtor, Pacific Crude Oil Company, neither had nor possessed any estate or any interest in the said real property, but had and possessed solely the right to enforce the performance of the trust in con-

nection therewith, against the said Trustee." This finding necessarily presupposes the existence of an express trust between the Pacific Crude Oil Company and its trustee, William H. Cochran, as the *cestui que* trust, in no other class of trusts becomes divested of all his estate and interest in the trust property. It evidently follows the provision of the statute of California pertaining to the effect of an express trust. Section 863 of the Civil Code of the State of California reads:

"Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

An express trust to real property, however, pursuant to the laws of the State of California, wherein the property in question is situated, can be established only by a trust agreement in writing and in no other manner. Briefly speaking, the laws of the State of California in reference to trusts in relation to real property are as follows: Section 847 of the Civil Code of said state declares that "Uses and trusts in relation to real property are those only which are specified in this title." Section 852 of said Code provides: "No trust in relation to real property is valid unless created or declared: 1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing; 2. By the instrument under

which the trustee claims the estate affected; or, 3. By operation of law.” The first two of these modes constitute the means whereby all express trusts in land are created and section 857 of the said Civil Code expressly specifies the purposes for which an express trust may be created and which is to be evidenced by the instrument creating such trust. A valid trust in relation to real property can only be created by operation of law or declared by an instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same. (Sec. 1971, Code of Civil Procedure of Cal.)

It is not contended in the case at bar that an instrument in writing declaring the trust was executed (see Interrogatories 13 and 20, Tr. pp. 37-38, and answers thereto, Tr. pp. 46-47), but the trust relation arose from the following admitted state of facts as disclosed by the testimony of the complainant himself. He testified as to the circumstances attending the purchase of the property involved herein and the taking of the title thereto in his name as follows:

“I was coming to California first in February, 1914, in connection with some business, and at that time those who subsequently became the officers and directors and stockholders of the Pacific Crude Oil Company were about organizing the company, but the organization had not been completed before I left. However, they retained me as attorney to take up the matter particularly of the purchase of this Big Sespe property, as it was commonly called, and they gave me general instructions as to what they wanted to accomplish,

and that was to buy the property and take care of it; and I came out here on other matters, as I say, and then immediately took up that matter, and on March 30, with the money they furnished me, I acquired the title represented by the two deeds which went into evidence this morning.” (96.)

It is true that the grantee named in the two deeds from this appellant (557-562) transferring the title to the property is “William H. Cochran, Trustee for Pacific Crude Oil Company.” These are the only instruments in writing shown, by the record, to have ever existed relating to any trust in the property.

These instruments are insufficient to create or declare any trust.

*Wittfield v. Foster*, 124 Cal. 418;

*Carpenter v. Cook*, 132 Cal. 621.

These two cases, especially the former, are directly in point and conclusive of the question we are now discussing.

This recital of the circumstances under which said property was purchased by William H. Cochran in his name brings the relationship between him and the Pacific Crude Oil Company squarely within the definition of a resulting trust contained in section 853 of the Civil Code of the State of California. It provides:

“When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by and for whom such payment is made.”

The above quoted statutory provision embodies the generally established principle that when the purchase money of land is paid by one party and the legal title is taken in the name of another, a resulting trust arises in favor of the party from whom the consideration proceeds and which will be enforced in a court of equity. Perry on Trusts, 6th Edition, page 18, says in regard thereto:

“Resulting trusts are trusts that the courts presume to arise out of the transactions of parties, as if one man pays the purchase money for an estate, and the deed is taken in the name of another. Courts presume that a trust is intended for the person who pays the money.”

And the same author says on page 190:

“If a person having a fiduciary character purchase property with the fiduciary fund in his hands, and take the title in his own name, a trust in the property will result to the *cestui que* trust, or other person entitled to the beneficial interest in the fund with which the property was paid for.”

In the foot-note to this text it is said:

“A resulting trust is based upon the intention of the party who directs the transaction; a constructive trust is imposed upon him by equity, usually directly contrary to his intention, \* \* \*”

As no instrument in writing declaring the trust and defining and limiting the uses and purposes of the trust property and the duties of the trustee as to its control, management and disposition, was executed by

the Pacific Crude Oil Company and William H. Cochran, the mere fact that the parties had understood or orally agreed that the latter should hold the property in trust does not in any way militate against the nature of the trust as one which came into being under section 853 of said Civil Code. In *Gerety v. O'Sheehan*, 9 Cal. App. 447, 449, 450, it is said in reference thereto:

"Any agreement found to exist between the parties was oral; hence, such agreement could not constitute an express trust (Code Civ. Proc., Sec. 1971), and being oral, plaintiff could not base any right to recover thereon. Therefore, any allegation in the complaint, or findings of fact, in respect to this oral agreement may be disregarded as immaterial. The fact that the parties agreed verbally to do that which the law implies from their acts did not in any wise affect the character of the transaction as a trust created by operation of law. (*Bayles v. Baxter*, 22 Cal. 575.) Nor is there any uncertainty as to the portion of the property to which the trust extended, as it results, not from any agreement, oral or otherwise, with reference to the proportion of interest which each shall hold, but from the facts shown as to the amount of purchase money advanced by each. (*Faylor v. Faylor*, 136 Cal. 92 (68 Pac. 482).)"

The same principle is expressed by the Supreme Court of the United States in *Smithsonian Institution v. Meech*, 169 U. S. 398, 42 L. Ed. 793, 798, wherein the Court also defines the essential distinction between express and resulting trusts. The Court says there:

“The general proposition is unquestioned that, where upon a purchase of property the conveyance of the legal title is to one person while the consideration is paid by another, an implied or resulting trust immediately arises, and the grantee in the conveyance will be held as trustee for the party from whom the consideration proceeds.

“This rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase to be for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes, and this rule is vindicated by the experience of mankind. 1 Perry, Tr., 4th ed., §126. \* \* \*

“The existence of an express agreement does not destroy the resulting trust. It was not an agreement made by one owning and having the legal title to real estate by which an express trust was attempted to be created, but it was an agreement prior to the vesting of title—an agreement which became a part of and controlled the conveyance.”

The purchase of the land was made by William H. Cochran at the instance of the Pacific Crude Oil Company, with its money and for its benefit, and said William H. Cochran by taking the title in his name became a trustee for said corporation, holding only the naked legal title and being charged with the obligation to convey the land to the Pacific Crude Oil

Company at the latter's demand. This obligation was enforceable in equity by the Pacific Crude Oil Company against said Cochran or anyone succeeding to the title of trustee. In *South San Bernardino Land and Improvement Company v. San Bernardino National Bank*, 127 Cal. 245, the legal title of the trustee was sold under execution and the purchaser took the same with notice of the equity of the *cestui que* trust. The Court held there that the *cestui que* trust could compel such purchaser to convey the legal title to himself. The Court said, on page 247:

“It is settled law that where one pays the purchase price of land and the land is thereupon conveyed to another, the title to the land is held, under such conveyance, in trust for the person who has paid the purchase price. (Civ. Code, Sec. 853.) \* \* \* and the *cestui que* trust may, in a court of equity, compel a conveyance to himself of the legal title as well from anyone succeeding to the title of the trustee, with notice, as from the trustee himself. (2 Pomeroy's Equity Jurisprudence, Sec. 1038.)”

In other words, the trustee under a resulting trust has no interest in the property to which a judgment lien can properly attach or which could be sold to the exclusion of the rights of the *cestui que* trust. In *Atkinson v. Hancock*, 67 Iowa 452, 25 N. W. 701, one Cummins, against whom a judgment lien subsisted, purchased certain lots for one Slead and took the deed in his name, although said Slead paid the purchase price therefor. It was claimed that the

judgment lien against Cummins attached to said lots, but the Supreme Court of Iowa, holding that such contention could not be maintained, said:

“But, if it be conceded that Cummins paid the purchase price to Harrison, and the deed was delivered to him, the fact remains that the money so paid belonged to Slead, and that the payment was made for the purpose of vesting the title to the lots in the latter. Cummins was, it is true, vested with the naked legal title. The conveyance was made to him as a matter of convenience. He was a mere conduit and held the legal title in trust for Slead. Under the circumstances Cummins had no interest on which the judgment became a lien. His creditors can only get what he had, and what he had was of no pecuniary value.” (Citing cases.)

A judgment affects the actual interest which the judgment debtor has in the property upon which the judgment is sought to be enforced. In *Riley v. Martinelli*, 97 Cal. 575, the Supreme Court of California uses the following language in regard thereto on page 580:

“The doctrine is well established, also, that the lien of a judgment and execution attaches to the real, instead of the apparent, interest of the judgment debtor in and to his property, \* \* \*”

The Pacific Crude Oil Company at the time of the execution sale in question having paid the purchase price for the property owned all the equitable title and interest in said property, and the defendant herein

by purchasing the same at the sheriff's sale acquired the whole thereof. William H. Cochran as the holder of the legal title under a resulting trust had no interest in the property and was charged with the duty to convey the legal title on demand of the *cestui que* trust or the defendant, its successor in interest.

## POINT 2.

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### Upon Purchase of the Property at the Sheriff's Sale the Appellant Became Entitled to the Rents and Profits Therefrom and in No Event Can He Be Deemed a Trespasser.

Based upon same portions of the record referred to in connection with Point 1, *supra*.

The interlocutory decree (375) in paragraph "Eighth" thereof declares: "\* \* \*, the said purchaser, Big Sespe Oil Company, was not entitled to such possession or occupation of the said real property;" From this holding of the District Court the Special Master concluded, "\* \* \*, that the defendant's possession, occupation and operation of the property was illegal, and that the defendant was a trespasser thereon" (408).

We have already shown (*supra* pp. 43 to 52) that the judgment debtor, Pacific Crude Oil Company, was at the date of the levy and the execution sale the owner of the complete equitable title to the property; that this equitable estate amounted to and was the entire beneficial estate, and was equivalent in equity to the corresponding legal estate.

See also in this same connection:

Pom. Eq. Jur., 4th Ed., Vol. 3, Sec. 1043, p. 2367.

Cochran as trustee was merely a holder of the naked legal title. Prior to the execution sale the judgment debtor, Pacific Crude Oil Company, and not Cochran, was entitled to the rents and profits and likewise the possession of this property. Upon the sale, this appellant, as purchaser, acquired all the rights of said judgment debtor in the land and, therefore, became the owner of the complete title, with all the rights springing from the beneficial ownership thereof, subject only to have its estate defeated by a proper redemption and the right of the judgment debtor to the possession of the property during the period allowed for redemption.

*Code of Civil Procedure*, Sec. 700;

*Pollard v. Harlow*, 138 Cal. 390, at 392;

*Robinson v. Thornton*, 102 Cal. 675, at 680;

*Leet v. Armbruster*, 143 Cal. 663, at 666.

In *Pollard v. Harlow*, *supra*, the Court at page 392, in discussing the rights acquired by the purchaser at an execution sale, quoting from a previous decision by the same court, used the following language:

“Upon the sale, he acquired all the right, title, interest, and claim of the judgment debtors there-to (*Code Civ. Proc.*, Sec. 700), subject to be defeated by a redemption within six months, and to the right of the judgment debtors to remain in the possession of the land until the execution of

the sheriff's deed; and all that remained in the (judgment debtors) was this right of redemption and to retain possession of the land until the expiration of the time therefor.' ”

The Code of Civil Procedure is specific in providing not only that the purchaser at such sale acquires all the right, title and interest of the judgment debtor, subject only to the right of redemption, but in addition thereto acquires another very substantial right, viz., such purchaser upon said sale immediately becomes the *absolute owner of and entitled to all the rents and profits of said property during the period allowed for redemption.*

*Code of Civ. Proc.*, Sec. 707.

This appellant, therefore, upon said execution sale, immediately became and, therefore, continued to be entitled to receive the entire rents and profits of the property involved in the redemption, and this right existed no matter who was in possession.

*Walker v. McCusker*, 71 Cal. 594.

See, also:

*Duff v. Randall*, 116 Cal. 226, at 230,

wherein the Court, in discussing the right of the purchaser to all the rents and profits of the property sold or the value of its use and occupation from the time of the sale until the redemption, says:

“ \* \* \* the purchaser has the entire beneficial interest in the property, subject to be defeated by a redemption from the sale: \* \* \*

‘It is not a mere right to have a certain sum charged upon the property satisfied out of it. The sum before charged upon the land has already been satisfied by the sale to the extent of the amount bid and paid by the purchaser. *The purchaser has already bought the land and paid for it.*’ ” (Italics ours.)

If this appellant was the owner in equity of the land (Page v. Rogers, 31 Cal. 293), or possessed of the complete beneficial ownership (Pollard v. Harlow, *supra*), and was entitled to the rents and profits no matter who was in possession, how can it be said that complainant or the judgment debtor was in any wise injured by the possession of appellant, and where is there any justification for enforcing against this appellant, as was done by the master (412 *et seq.*) and confirmed by the Court (360), the harsh rule of willful trespasser, as announced in Mahony v. Bostwick, 96 Cal. 59, a case wherein defendant, who held only a mortgage without the right of possession and was not entitled to the rents or profits or the value of the use and occupation of the property, forcibly ousted the owner from his property? As heretofore stated, the evidence fails entirely to show that any force, threats or intimidation whatever was used by appellant in taking possession of said property or in operating the same, and that no objection or interference with said possession or occupation was made by said judgment debtor or complainant or said trustee at any time until the commencement of this action.

Indeed, this question of possession or right to possession during the period of redemption over which so much was made in the lower court is immaterial in this case. Such possession was taken solely for the purpose of operating and caring for said property. *Its only value was as an instrumentality to produce "profits" from said land*, and, as heretofore stated, these profits belonged to and were the property of appellant, even if the judgment debtor itself was in possession and producing them. This possession of appellant and its operation of the property was a benefit and not a detriment to the judgment debtor. All the expense of care, maintenance and production were borne by appellant and thus saved to the judgment debtor.

This error is vital. Based upon it the Court, in confirming the master's report (see oral opinion of Dist. Judge, Tr. 360 *et seq.*), denied appellant credits as follows (see Special Master's Report, Record page 419, and section VI, Record page 429):

Hornada's salary (Record page 430).....	\$ 3,700.00
"        provisions (Record page 432) ..	931.64
"        transportation (Record page 433)	138.31
Repairs (Record pages 434-435).....	380.24
Miscellaneous expenses (436) .....	242.25

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Total disallowed (Record pages 436-7) \$5,392.44

The foregoing were expressly denied on the one ground that appellant was a trespasser.

In addition thereto disbursements by supplementary statement should be added  
 (Record page 471)..... 1,365.78

Total .....\$ 6,758.22

Other credits, denied on other grounds, and herein claimed to be proper, were likewise denied on this ground as follows:

“Improvements”	Restoring wells Nos. 3 and 4 (Tr. 439-440) .....	1,278.39
“	Wells 1 and 5 (Tr. 440-441) .....	1,192.34
“	New water system (Tr. 442) .....	94.15
“	New road (Tr. 443-444) .	814.20
“	Additional gauging tank (Tr. 445) .....	75.00
		<hr/>
		\$ 3,454.08

Grand total .....\$10,212.30

The foregoing does not include any part of the 5/6 of the gross production of the output (or selling price) customarily allowed to an operator for managing the real property for the appellee, after deducting all expenses of operation. This sum was claimed to be \$773.01 (Tr. 383-384).

Upon the execution sale on March 3, 1917, appellant, as the purchaser of all the right, title and interest of the judgment debtor, entered into the possession of the property and thereafter operated the property, at

great expense to it, and realized from such operations the sum of \$24,054.11 as gross receipts. In and by the final decree (499) it was compelled to account for every cent of these gross receipts, except the sum of \$746.31 (Mas. Rep. 425) paid for state and county taxes. In addition thereto (Mas. Rep. 453-454) appellant was charged with each amount of money received by it from the sale of the oil as of the date when each such amount was received, and this amount was then deducted from the amount then owing on the judgment, and in addition thereto appellant was charged with interest at 7% per annum on each of these amounts from the date of its receipt until the entry of the final decree. In addition, monthly rests were ordered and each amount of proceeds received by appellant was ordered (Mas. Rep. 454) "to be deemed money of the judgment debtor paid into the hands of the purchaser, and should be immediately applied as in payment on the principal amount of \$17,340.50 paid by the defendant as purchaser at the execution sale, after adding interest at the rate of 1% per month." In other words, the interest at 1% per month was ordered computed only upon the balance remaining after deduction therefrom of the moneys received by appellant from month to month out of the profits of the property. Appellant, as heretofore stated, was allowed nothing for expenses, labor, repairs or improvements placed upon the property.

All this was on the theory, appearing for the first time in the case in the special master's report (408),

that appellant in entering into the possession of and operating said property was a *willful trespasser*.

In approving the master's report, the Court confirmed the master's recommendation and finding (453-454) in which it was held that appellant should be charged for each amount of money received by it from the sale of the oil extracted as and of the date when each such amount was received; that appellant should also be charged with interest at 7% per annum upon each amount as received from the time of the receipt of each of said amounts; and that from March 3, 1917, and monthly thereafter, up to April 1, 1918, appellant was not entitled to and should not be credited for interest at 1% on the entire amount of the purchase money paid at the execution sale, but that monthly rests should be made and the amounts received by appellant during the preceding month should "be deemed money of the judgment debtor paid into the hands of the purchaser" and immediately applied as payment on the principal amount and interest thereafter charged by appellant only on the balance.

This was manifestly error, because, as heretofore shown, appellant was entitled to the amounts received. They were the "profits," the value of the use and occupation, *they belonged to the appellant, not to the judgment debtor*. It is absurd to say that, upon the receipt of money by a person to whom it belongs and who is entitled in his own right to receive it, an obligation at once arises whereby he becomes obligated to pay interest thereon to some other person. It is true

that, in the event of redemption, the judgment debtor is entitled to credit for the amount of the profits received.

*Code of Civ. Proc.*, Sec. 707.

But neither this section of the code last cited nor any other law of California provides that the judgment debtor or redemptioner is entitled to credit not only for the rents and profits received, but for interest thereon.

Again, this question of possession is immaterial in this case, because and for the reason that the only person who is shown by the record to have had any right to the possession of the property was the judgment debtor, the Pacific Crude Oil Company. It is not a party to this litigation. Complainant cannot question appellant's possession. His rights are based solely upon an alleged assignment (Compl. Ex. 8, 569) from the judgment debtor, and this instrument does not transfer or assign nor purport to transfer or assign any right to the possession of the property, nor any right to damages growing out of any past trespass, assuming (which we do not admit) that any such right is assignable.

Nor was there before the court a party entitled to the balance of the profits calculated by the special master to amount to \$3,843.84, which, together with the interest thereof, the court directed appellant to deposit in court for the final disposition thereof. In no event can the complainant claim any interest in the

rents and profits from the property in question. His alleged assignment (Compl. Ex. 8, Tr. p. 569) does not give nor does it purport to give him any such right. The Pacific Crude Oil Company was not made a party to this action. Much less has the intervenor William H. Cochran as trustee any right thereto, for the reason that as such trustee William H. Cochran was the holder of the naked legal title and had no beneficial interest whatever in the property.

It must be manifest from this state of facts that the accounting before the special master, proceeding, as it did, upon the theory that appellant was a mere trespasser, was based upon an erroneous premise, and that the decree of the court affirming said account and report should be reversed.

### POINT 3.

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#### The Attempted Demand for a Statement of Rents and Profits Made on March First, 1918, Was Invalid and Ineffectual for Any Purpose.

Based upon answer, paragraphs X, XI and XII (57-59 inc.), XXIII (73); Assignment of Error, 9 and 10 (517), 13 (517), 14 (518), 15 and 16 (518).

On the 1st day of March, 1918, to-wit, two days before the expiration of the statutory time for redemption, a demand (27) was presented purporting to come from William H. Cochran, attorney for the Pacific Crude Oil Company, from William H. Cochran as trustee and from William H. Cochran individually.

The latter obviously had no right in the premises in view of the fact that even the alleged assignment to him of the right of redemption was made long after March, 1918, namely, in the following year. William H. Cochran as trustee likewise had no right to make such demand, as he was neither the judgment debtor nor its successor in interest, in the whole or any part of the property. The Pacific Crude Oil Company as the judgment debtor had an undisputed right to make such demand, but said demand purported to emanate from William H. Cochran as attorney for said Pacific Crude Oil Company and William H. Cochran was not the attorney of record for the same. Section 707 of the Code of Civil Procedure of the state of California providing the procedure for a demand and accounting expressly requires that the demand for a statement of rents and profits should be made in writing, and such demand operates to extend the statutory period of time for redemption. Such demand necessarily is predicated upon the right to redeem and to call for an accounting in behalf of the judgment debtor. The very multifariousness of the signature of said William H. Cochran affixed to said demand suggested the probability that he was not authorized at all to act in the premises for the judgment debtor and to make the demand in writing referred to in said section 707, C. C. P.. Upon demand (Compl. Ex. 7, Tr. p. 27) on the part of appellant to exhibit his authority to demand an accounting for the judgment debtor, it was incumbent upon said William H. Cochran to

comply with said demand. He refused to do so and nothing more was done in the matter until the expiration of one year and four months, when this action was commenced.

Furthermore, it appears, from the evidence, that appellant's demand for proof of said William H. Cochran's authority to demand a verified statement of account was fully warranted and that said William H. Cochran, in point of fact, had no legal authority to act for the judgment debtor in the premises.

William H. Cochran, the complainant herein, testified in reference to his employment by the Pacific Crude Oil Company as follows (90):

"I was retained generally to come to California and take charge of any interests which the Pacific Crude Oil Company might determine to look into or go into in this state, and particularly to acquire the title to this property, which was commonly known as the Clampitt property, and I did that, and represented them, as I say, in various matters, and tried to work out their affairs here for five years."

This employment was in 1914 (96).

So, too, in response to Interrogatory No. 13 (46), it is stated:

*"I never was the agent of the company. I was the attorney at law in California, for the company; but there was no particular written document of such retainer. There was no particular document authorizing me to represent the company as its Trustee. But in my capacity of attor-*

ney for the Company I received several written communications directing and authorizing me to act as trustee for the Company in acquiring the title to the real property involved in this suit, and to take such title in my own name as Trustee for the Company." (*Italics ours.*)

William H. Cochran thus confessedly was employed by the Pacific Crude Oil Company for the period of five years without having any written power to act for the same. Such agreement of employment under the statute of frauds is invalid. Section 1624 of the Civil Code of the state of California reads in part as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing, and subscribed by the party to be charged, or by his agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof; \* \* \*

This fundamental principle embodied in the aforesaid section of the Civil Code of the state of California applies to all cases wherein the period of employment is fixed for a period of time in excess of one year although the agreement might be performed within a year, as well as to cases wherein no specific period for the duration of the contract is fixed but which within the contemplation of the parties is not to be performed within one year. This rule is stated in 1 Chitty on Contr. (11th Ed.) page 99 in the following language:

“This enactment applies to all contracts, the complete performance whereof is of necessity to extend beyond the space of a year; the rule being, that where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a longer period than one year, the case is within the statute. Accordingly, the provisions of the statute render a verbal contract void, if it appear to have been the understanding of the parties at the time, that it was not to be completed within a year, although it might be, and was, in fact, in part performed within that period.”

And in *Seymour v. Oelrichs*, 156 Cal. 782, the Supreme Court of the state of California applied this principle to a contract of employment which did not specifically fix the time of duration of the employment but which was to continue for a number of years.

In this case, the agreement of employment of William H. Cochran by the Pacific Crude Oil Company covered the period of five years, and not being evidenced in writing as required by section 1624, C. C., was utterly void. William H. Cochran therefore had no right to make the demand in writing as attorney of the judgment debtor, and the attempted demand being unauthorized did not extend the period for redemption. The time therefor expired on the 3d day of March, 1918, and the title of appellant having become absolute on that day, a writ of mandate subsequently was issued by the Superior Court of Ventura county directing the sheriff to execute a deed conveying to appellant the property in question. This he did on August 29, 1918 (598).

#### POINT 4.

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An Assignment by the Judgment Debtor of the Mere Right to Redeem Does Not Under the California Statute Entitle the Assignee to Redeem Unless He Has an Interest in the Whole of the Property or Some Part Thereof.

Based upon Answer, paragraphs XVII (65), and XXII (72); Inter. Dec., paragraph Twelfth (377), and Final Decree, (498, 500); Assignment of Error, 9 and 10 (517), 17 to 20 inc. (518 and 519).

The right to redeem from an execution sale does not exist independently of statute. It can be exercised only by those persons who are specifically designated and enumerated in the statute.

In *Lynch v. Burt*, 132 Fed. 417, 429, it is said in regard thereto:

“In the absence of statutory provision therefor there is no right of redemption from execution sales, and it logically follows that the extent or measure of the right is found in the statutory terms prescribing the time and method of its exercise and designating the persons who may exercise it. *Keely v. Sanders*, 99 U. S. 441, 446, 25 L. Ed. 327.”

The statute of California, section 701 of the Code of Civil Procedure, confers the right of redemption only upon two classes of persons: first, “the judgment debtor or his successor in interest *in the whole or any part of the property*”; and, second, creditors who are

termed redemptioners. The statute does not mention any other person who may avail himself of the right of redemption. While it may be true that the judgment debtor may redeem although he has parted with his interest in the property or any part thereof, as the right of redemption is specifically granted to him, he cannot, independently of a transfer of some interest in the property, clothe a stranger as assignee with the right of redemption which is given only to him personally or to his successor in interest in the whole or part of the property. The statute does not extend the right of redemption to assignees of the judgment debtor but expressly names only his successors in interest in the property. Moreover, under the California statute the effect of redemption is to revest the person redeeming the property with such right and interest in the property as he had prior to the execution sale. It cannot be perceived that the statute intended to revest an assignee of the judgment debtor with an interest which he never had. The whole purpose of redemption is the restoration of the judgment debtor or his successor in interest in the property to the original estate. An assignee of the mere right of redemption has no interest in the property to which he could be restored. In order, therefore, to hold that the complainant here, as assignee of the mere right of redemption, has the right to redeem pursuant to the statute, it would be necessary to judicially insert into the statute the additional provision that the judgment debtor as well as his assignee may redeem. Such

interpretation or extension of the statute would be in conflict with the fundamental rule of construction of statutes enacted in derogation of the common law and cannot be adopted. It seems evident that under the statutes of California the complainant has no right to maintain this action.

In *Emerson v. Yosemite Gold Min. etc. Co.*, 149 Cal. 50, at 58, the Supreme Court of California, in discussing the essentials that must be possessed by a successor in interest of the judgment debtor in order to entitle such successor to redeem, used the following language:

“The thing adjudged in the redemption action was simply that the plaintiffs, as successors in interest, had the right to redeem the whole of this property from the foreclosure sale. That they should have this right, it was essential that they should be successors in interest of one or more of the judgment debtors *in some portion of the property*, but it was not essential to this right, and therefore not essential to the judgment, that they should be the successors in interest of all the judgment debtors. (Code Civ. Proc., Sec. 701, Subd. 1.) Their allegation that they were the successors of all the judgment debtors was material in the sense that it was necessary for them to prove that they had succeeded to the interest of some judgment debtor *in some part of the property*, and the judgment is necessarily conclusive upon that point.” (Italics ours.)

In every decision which we have been able to find, in the California Reports in which it has been held that the successor in interest of the judgment debtor had the right to redeem, it appeared that such successor in interest was a successor in interest "in the whole or any (some) part of the property" and possessed, prior to attempting to redeem, a deed or other conveyance from the judgment debtor to him of the whole or some part or portion of the property.

The assignment (569) to Cochran does not transfer or convey or purport to transfer or convey any part or portion of the property or any of the right, title or interest of the judgment debtor therein.

#### POINT 5.

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#### **The Purported Assignment of the Right of Redemption Is Invalid by Reason of the Fiduciary Relationship Existing Between the Complainant and His Assignor at the Time of the Alleged Assignment.**

Based upon same portions of the record hereinbefore referred to in connection with Point 4.

The assignment to complainant of the right to redeem the property involved herein, as testified to by the complainant himself (page 90), was made in consideration of services rendered by complainant in and about the same real property. In other words, the Pacific Crude Oil Company after having paid for the

property agreed by this assignment to part with its rights thereto for no consideration other than the services performed by the complainant in purchasing the property and taking care of the same. The complainant held the property for the Pacific Crude Oil Company as trustee. An assignment of any right thereto to the complainant, being a transaction upon which the law looks with scrutiny, cannot be upheld in a court of equity unless it is clearly established that all the stockholders of the Pacific Crude Oil Company had full knowledge of the facts concerning this transaction and also that the consideration paid for the same was fully adequate. Independent of the fact that said assignment does not disclose that the officers of the corporation who executed the same were duly authorized to make such assignment, which point is more particularly discussed *infra*, the evidence does not show that the stockholders of the Pacific Crude Oil Company had any knowledge of said assignment or agreed to the same.

The principle of law that in case of transfers of property between a *cestui que* trust and his trustee courts must inquire into the fairness of the transaction, is too well established to require extensive citation of authorities. This principle is expressed in sections 2230 and 2235 of the Civil Code of the state of California. Section 2230 provides in part:

“Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts, as agent,

has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

“1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so;”

Section 2235 C. C. reads as follows:

“All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.”

In *Broder v. Conklin*, 121 Cal. 282, 286, the Supreme Court of the state of California construing the above quoted section 2230 of the Civil Code says:

“This principle declared by the code is but a perfect echo of the common law. It is said in *Sugden on Vendors*, \*895, that to support such a sale ‘it must clearly appear that the purchaser at the time of the purchase had shaken off his confidential character by the consent of the *cestui que* trust, freely given, after full information and bargaining for the right to purchase.’ Tested by the principle of law, was Conklin, under the facts disclosed by the record, authorized to buy this property at the sale? And, in considering this question, it must be borne in mind that there are no presumptions in favor of the action of a trus-

tee where he deals with the property of his beneficiary. The presumptions are against him, and the burden of proof is upon him."

And in *Golson v. Dunlap*, 73 Cal. 157, 161, 162, the same court interpreting the meaning of the term "sufficient consideration," mentioned in section 2235 C. C., uses the following language:

"The argument is, that the words 'sufficient consideration' in this section do not mean an adequate consideration, but a consideration which is sufficient to support a contract between ordinary parties; and that if any valuable consideration be shown, the presumptions established by the section is rebutted, and the transaction must be held valid. It is to be observed of this proposed construction that it would place all trustees upon a level, and measure their obligations by the same standard, and that this standard is not a high one. But the analogies of the law of trusts have been extended to so many classes of cases, and the term 'trustee' is applied to so many persons whose obligations certainly vary in considerable degree, that we think it could hardly have been intended to apply any such Procrustes rule to them all. A fixed standard might gratify a love of symmetry and be easy of application, but would not further the ends of justice. In our view, the words 'sufficient consideration' mean not sufficient to support a contract between ordinary parties, but sufficient to support the particular transaction; and the presumption raised by the section can be rebutted only by proof of such a consideration. With reference to what consideration is sufficient to support the particular transaction, resort must be had to the rules of courts of equity."

In the case at bar the undisputed evidence discloses that the consideration for the assignment was not only inadequate but tended to operate as fraud upon the stockholders of the Pacific Crude Oil Company who had paid the money for the property. In addition thereto the evidence fails to show that the stockholders of said Pacific Crude Oil Company had any knowledge concerning the transaction or participated therein in any manner.

This action is brought in equity. The complainant, whose right to action is based upon said alleged assignment from his *cestui que* trust, should not be heard in a court of equity unless he establish to the satisfaction of the chancellor that said assignment was fairly obtained and that complainant did not take any advantage over the stockholders of the Pacific Crude Oil Company by reason of his position as holder of the legal title to the said property.

#### POINT 6.

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**Said Purported Assignment From Pacific Crude Oil Company, a Corporation, to William H. Cochran, Complainant, Was Not Legally Executed and the Pacific Crude Oil Company Was Not Bound Thereby.**

Based upon answer, paragraphs XVII (65) and XXII (72); Assignments of Error 18-19-20 (519).

The right to the action brought by complainant herein is founded upon a certain instrument in writing

purporting to be executed by the president of the Pacific Crude Oil Company and attested by the secretary thereof. This document, to which the seal of the corporation is affixed, is the only evidence introduced by complainant or found in the record to support his right to maintain this action. At the time of the introduction of said document in evidence the defendant objected to the introduction of the same upon the ground that no authority of the president or secretary of the corporation to execute the alleged assignment had been established (85), (98), (99). Appellant has an exception to the receipt in evidence of said Exhibit 8 (Exception 79, Tr. p. 99). Said objection was overruled by the court, and the complainant introduced no further evidence to prove the authority of said officers of the Pacific Crude Oil Company to assign to complainant the right to redeem the property sold at the execution sale.

It is a firmly established principle of law in reference to the powers of officers of a corporation that they are not general but special agents thereof, and have only such powers as expressly conferred upon them by the general laws and the by-laws of the corporation. In dealing with the assets of the corporation it acts through its board of directors as a whole, and no individual director or directors may convey or transfer any property of the corporation unless the board, by a resolution properly attested and authenticated, empowers the respective officers to perform the act in question. An oral authorization or approval of

such an act is wholly insufficient to legalize any act of individual officers of a corporation which, under the general laws and by-laws, can only be done through the board of directors.

In *Kansas City Hay-Press Co. v. Devol*, 72 Fed. 717, it is said, on page 721, in reference to an oral authorization by the board of directors:

“This statute does not say that an act shall be deemed to be that of the governing board whenever it shall be shown to have received the sanction of members of the board, but its express language is that this voice of the majority shall control in the corporate transactions, when ‘duly assembled as a board.’ How is this corporate action—the voice of the body politic—to be evidenced? Clearly, by assembling together as a board, either at regular, stated meeting, or at a called convention after due notice to each member of the board, as prescribed by the by-laws herein quoted.

“The state of California has a similar statute. In *Gashwiler v. Willis*, 33 Cal. 12, the court held that not all the stockholders, concurring by separate acts or joint act, could transfer the corporate property, because—

“‘The property in question was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not, in their individual capacities, owners of the property, as tenants in common, joint tenants, copartners, or otherwise.’

“And although the governing board of trustees were present, and participated in the act of the

stockholders, it was held to be ineffectual to pass the title. The court said:

“‘Such is not the mode in which the corporation is authorized by the law of its creation to manifest its will and exercise its corporate powers. The power to sell and convey could only be conferred by the trustees when assembled and acting as a board. This is the mode prescribed.’

“In *McCullough v. Moss*, 5 Denio, 567, the court says:

“‘The affairs of the corporation were to be conducted by five directors, a majority of whom formed a board for the transaction of business, and a decision of a majority of those duly assembled as a board was requisite to make a valid corporate act. \* \* \* The stockholders, as such, in their collective capacity could do no corporate act. The directors were their representatives, and alone authorized to act.’

“In *Cammeyer v. Lutheran Churches*, 2 Sandf. Ch. 208-229, the vice chancellor said:

“‘The directors in the bank, and the trustees, in this case, are, by the charter, the select class or body which is to exercise the corporate functions. In order to exercise them, they must meet as a board, so that they may hear each other’s views, deliberate, and then decide. Their separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers. Nor would their action in a meeting of the whole body of corporators, or of another and larger class, in which they are but a component part, be a valid

corporate act. In thus acting they would not be distinguishable from their associates, and their action is united with that of others who have no proper or legal right to join with them in its exercise. All proper responsibility is lost. The result may be the same that it would have been if they had met separately, and it may be different. In the general assemblage, influences may be brought to bear upon the trustees, which, in their proper board, would be unheeded, and no one can say with certainty that their vote in the latter event would have been the same.'

"In *State v. Ancker*, 2 Rich. Law, 245, the court, speaking of the action of a board illegally assembled, says:

"'Without being summoned together, the board, as individuals, have no official authority, nor have they any original authority at all, either under the charter or the by-laws.'

"So it is said in *Titus v. Railroad Co.*, 37 N. J. Law, 102:

"'The affairs of corporate bodies are within the exclusive control of their board of directors, from whom authority to dispose of assets must be derived.'

"See, also, *Bank v. Dunn*, 6 Pet. 51; *U. S. v. City Bank of Columbus*, 21 How, 356; *Railway Co. v. Allerton*, 18 Wall. 233; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 357; *Hyde v. Larkin*, 35 Mo. App. 365."

The same principle is enunciated in *Black v. Harrison Home Co.*, 155 Cal. 121, on pages 126 and 127, from which we quote as follows:

“It is an elementary principle of corporation law that the president of a corporation has no power merely because he is president to bind the corporation by contract. The management of the affairs of a corporation is ordinarily in the hands of its board of directors, and the president has only such power as has been given him by the by-laws and by the board of directors, and such other power as may arise from his having assumed and exercised the power in the past with the apparent consent and acquiescence of the corporation. The general rule in this regard is stated in 2 Cook on Corporations, section 716, as follows: ‘The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds or management. This is a rule which prevails everywhere, excepting possibly in the state of Illinois. \* \* \*

It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it, and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other one director.’ (See *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, 632 (21 Pac. 373); *Bliss v. Kaweah etc. Co.*, 65 Cal. 502 (4 Pac. 507); *Salfield v. Sutter etc. Co.*, 94 Cal. 546 (29 Pac. 1105); *Blood v. La Serena etc. Co.*, 113 Cal. 221 (41 Pac. 1017, 45 Pac. 252); *Barney v. Pfoor*, 117 Cal. 56, 58 (48 Pac. 987); *Northwestern etc. Co. v. Whitney*, 5 Cal. App. 105, 108 (89 Pac. 981).)”

In *Mattoax Leather Co. v. Patzowsky*, 2 Boyce Del. Rep. 327, 80 Atl. 241, the syllabus reads as follows:

“That, without official action, a majority of the directors of a corporation orally authorized plaintiff’s officer to sell a machine owned by the corporation, and to sue for the price, is insufficient to show plaintiff’s right to recover the price.”

In this case it was sought by oral evidence to prove the authority of the secretary and treasurer of the corporation to sell a certain machine belonging to the corporation, and also to prove the authority of said secretary and treasurer to enter suit for the purchase price. The said secretary and treasurer testified that he had no written authority to make said sale or to bring said suit, but that the majority of the directors orally authorized him to sell it and to bring suit for the purchase price. The court, in discussing this testimony, held it was inadmissible, using the following language:

“We now have no doubt that the plaintiff has not shown sufficient authority, and we order that the testimony of this witness as to his authority to sell and sue be stricken out.”

This is an authority from the state of Delaware, under the laws of which the alleged assignor in said assignment was incorporated.

Paragraph fourteenth of the interlocutory decree (379), after finding that the judgment debtor, Pacific Crude Oil Company, was a corporation existing under the laws of the state of Delaware, finds as follows:

“That, on January 28, 1918, said Pacific Crude Oil Company forfeited its charter to the said state of Delaware for and because of non-payment of certain taxes then due to that said state.”

The said decree then proceeds to the effect that, notwithstanding said forfeiture, the said judgment debtor did not cease to exist as a corporation, but, under the laws of Delaware, was continued as a body corporate for three years, for the purposes, and with the powers, in said statutes described, including the redemption of the property in this case, and the bringing and maintaining of all necessary actions in connection therewith; also that said corporation continued a body corporate, and retained its officers and directors, with the authority theretofore possessed by them and each of them, and that the said assignment (Complainant's Exhibit 8) was made and executed by the legally constituted and authorized attorneys and officers of said company.

Section 74 of the Delaware Franchise Tax Law, quoted in full in the transcript (643), provides that when any corporation shall for two consecutive years fail to pay the state any taxes, “the charter of such corporation shall be void, and all powers conferred by law upon such corporation are declared inoperative and void. \* \* \*”

It was contended by appellee in the court below—and this contention was sustained by the interlocutory decree—that, notwithstanding the provisions of said section 74 of the Franchise Tax Law, the said cor-

poration continued to exist as a corporation and to have all the rights theretofore possessed by it so far as its actions in connection with this case are concerned. This contention was based upon the provisions of sections 40, 41 and 42 of the general corporation laws of the state of Delaware, which are quoted in full in the transcript (639-640), and which read as follows:

“Sec. 40. CONTINUATION OF CORPORATION AFTER DISSOLUTION; FOR PURPOSES OF SUIT, &c.:—All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which said corporation shall have been established.

Sec. 41. TRUSTEES UNDER DISSOLUTION:—Upon the dissolution of any corporation under the provisions of section 39 of this Chapter, the directors, or the governing body, by whatever name it may be known, shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell, and convey the property, real and personal, and divide the moneys and other property among the stockholders, after paying its debts.

Sec. 42. TRUSTEES UNDER DISSOLUTION; POWERS AND LIABILITIES:—The persons consti-

tuted trustees as aforesaid shall have authority to sue for and recover the aforesaid debts and property, by the name of the trustees of such corporation, describing it by its corporate name, and shall be sueable by the same name for the debts owing by such corporation at the time of its dissolution, and shall be jointly and severally responsible for such debts, to the amounts of the moneys and property of such corporation which shall come into their hands or possession.”

Appellant disputes the contention that the corporation whose charter is forfeited under the Franchise Tax Law of the state of Delaware comes within the provisions of the sections of the general corporation laws of the state of Delaware concerning the status of such corporations after “dissolution” as therein defined. Section 40 of said Delaware laws, above quoted, limits the provisions thereof to corporations which “expire by their own limitation or are otherwise *dissolved*.” The present case certainly is not one where a corporation has expired by its own limitation. The word “dissolved” as used in said last-mentioned section refers to a voluntary dissolution such as is provided for in particular by the provisions of section 39 of said corporation laws (637-639, inc.), and does not refer to a corporation which is involuntarily dissolved by the forfeiture of its charter. The exercising or attempting to exercise any powers under a charter of any corporation whose charter has been forfeited under the Franchise Tax Law is expressly

declared to be a misdemeanor by section 77 (644) of said Franchise Tax Laws of Delaware.

But, if we are in error as to the non-applicability of the statutes of Delaware relating to the dissolution of corporations, to a corporation whose charter has been forfeited as in the present case, yet an application of these general laws relating to the dissolution of corporations and the powers of the officers and directors on such dissolution does not affect the principle for which we are now contending, namely, that no sufficient authority was shown for the execution of Complainant's Exhibit 8, upon which his entire right to prosecute this action was based.

In and by the provisions of sections 41 and 42 of said General Corporation Laws before quoted, it is provided, in general, that upon dissolution "*the directors or the governing body*, by whatever name it may be known, shall be trustees thereof." Pursuant to this express provision of the statutes of the state of Delaware, the directors of the corporation, upon the termination of its existence, became trustees for the same, and as such necessarily had less right to dispose of any property of the corporation, unless all the trustees "as the governing body," agreed thereto. These trustees must and could only legally act as a board or governing body, and not as individuals.

In addition thereto, it appears from the testimony of complainant himself that this document was executed by the president and secretary of the Pacific Crude Oil Company, by way of adjustment of com-

plainant's claims against said corporation for services rendered. The complainant testified that he had no agreement with the corporation in regard to his compensation (90), and he contends that there was a difference of opinion as to the value of his services between himself and said corporation. It seems manifest that, under such circumstances, individual officers of the corporation could not, without a proper resolution of the board of directors or governing body, compromise said claim and dispose of the right of redemption of the Pacific Crude Oil Company, if any it had, to the said property. The Pacific Crude Oil Company had invested a large amount of money in the acquisition of said property, and the purpose and effect of said document was a relinquishment of the investment heretofore made by such corporation and its stockholders.

#### POINT 7.

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#### **The Court Had No Jurisdiction Because of the Lack of Diversity of Citizenship Between the Parties.**

Based upon answer, paragraph I (56), and Assignments of Error 63-65, inclusive (532).

The complaint, in paragraph first thereof (5) alleges that jurisdiction arises and is given to the Court "by reason of the diversity of the citizenship of the parties hereto. Complainant is now and always has been a citizen of the state of New York." This is

followed by allegations to the effect that the Pacific Crude Oil Company, plaintiff's assignor, is a Delaware corporation, and that the two defendants are citizens and residents of the state of California. It will be noted that the bill of complaint does not specifically allege that complainant is a citizen of the United States, nor does it at all allege of what state he is a resident. Paragraph I of the answer denies, for lack of knowledge or information or belief, the allegation in said bill that complainant is or was at the time of the commencement of the action, or at any other time, a citizen of the state of New York.

It will be noted that both the interlocutory and the final decree are entirely silent on the question of the citizenship of complainant. The court made no finding or decree on this issue.

There is nothing better settled than that where the jurisdiction of the District Court is dependent upon diversity of citizenship, it must affirmatively appear of record that the Court determined and found that there in fact was a diversity of citizenship.

In *Roberts v. Lewis*, 144 U. S. 653, 656, 36 L. E. 579, 582, this rule is stated in the following language:

"Whenever the jurisdiction of the Circuit Court of the United States depends upon the citizenship of the parties, it has been held from the beginning that the requisite citizenship should be alleged by the plaintiff and must appear of record; and that when it does not so appear this court, on writ of error, must reverse the judgment, for want of

jurisdiction in the Circuit Court. *Brown v. Keene*, 33 U. S. 8 Pet. 112 (8:885); *Continental Ins. Co. v. Rhoads*, 119 U. S. 237 (30:380)."

(A) Burden of proof was on complainant

In the case at bar, the denial of the allegation contained in the complaint as to the diversity of citizenship upon want of information and belief, put the question of the jurisdiction of the court in issue. It was, therefore, incumbent upon the complainant to prove his allegation of the complaint in reference to the said complainant being a citizen of the state of New York.

In *Hanchett v. Blair*, 100 Fed. 817, wherein a suit in equity was brought for a foreclosure of mortgage, the Circuit Court of Appeals of this Circuit passed upon this precise question. In that case, *which was a suit in equity*, the defendant, as here, in his answer alleged that he had no knowledge, information or belief sufficient to enable him to answer the allegation as to diversity of citizenship, and upon that ground defendant denied said allegation. The court said, at page 820:

"The only effect of such a denial is to compel the complainant to make prof upon that point. In *Dutilh v. Coursault*, 5 Cranch. C. C. 349, Fed. Cas. 4206, it was held that the answer of a defendant in chancery, who has no personal knowledge of the fact he states, and whose conscience cannot be affected thereby, is not evidence in the case, although responsive to the allegations of the bill.

The only effect of such an answer is to present an issue, and put the plaintiff to the proof of his allegations.”

There is no evidence in this case establishing the claim of complainant that he was in fact a citizen of New York at the time of the commencement of this action. The evidence, if any, in regard to complainant's residence during the period of time between 1914 and 1919 tends to show that complainant, during the greater part of said time, resided in the state of California. It is evident from complainant's own testimony that even an inference therefrom could not be drawn that complainant was not a citizen of the state of California or that he was a citizen of New York or any other state. As heretofore stated, no direct evidence was offered either by complainant or defendants on this question of citizenship. Indeed, there is no evidence in the entire record on the question as to the *citizenship* of complainant in any state. The only evidence bearing in any manner, directly or indirectly, upon this question of citizenship was that of plaintiff with relation to his place of *residence* for the five years preceding the bringing of this action. That evidence is as follows: In his answer to interrogatory No. 13 (46) he states: “I was the attorney at law in California for the company.” In his testimony (86) he states that in February, 1914, he was coming to California, particularly Los Angeles. He further testified (90) that he was retained generally to come to California and take charge of any interests

which the Pacific Crude Oil Company might be interested in in this state, and that he purchased the property in question and represented the company "and tried to work out their affairs *here* for five years." He further testified (96) that his instructions received in February, 1914, from the company were that he was retained as attorney to make this purchase and they gave him general instructions to buy the property and take care of it; and further (99) that he came to California in February, 1914, and then went East "to New York, Philadelphia, the mountains of Virginia, Atlantic City and numerous places;" and (99-100) that he returned to California in May or June, 1915, and remained here until January, 1918. He testifies (123) that on January 21, 1918, he received a memorandum which was left for him at the Angelus Hotel in Los Angeles, "where I received all my mail and telegrams." It further appears (587) from a letter written by complainant on March 30, 1918, that he was on that date a resident of Los Angeles, California. In that letter (588) he refers to his "home" as the place where he was living in Los Angeles, and distinguishes it from the place where his mail should be addressed, to-wit, the Angelus Hotel. The meaning of the word "home," as used in such letter, is explained by the testimony of Cochran (117) in which he states that he was living in Los Angeles at that time "on Hobart street, I think, not at the Angelus Hotel." He further states (117) that he was not East at all during 1918. From a letter written by complainant April 19, 1918

(589), it appears that he was still a resident of Los Angeles on the last-mentioned date; and from a subsequent letter, dated June 6, 1918 (592) it appears that he was still residing in the city of Los Angeles. Indeed, by a series of correspondence between complainant and the attorneys representing the sheriff in the mandate proceedings in the Superior Court of Ventura county, it appears that he was living in the state of California at least up to and including August 9, 1918 (587 to 598, inc.).

We submit that the only inference that can be drawn from this testimony is that the residence and domicile of this complainant at the time of the commencement of this action was in the state of California, and, there being no evidence that he was a citizen of the state of New York, it must be assumed that he was a citizen of the state of California.

## POINT 8.

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**The Complainant or His Assignor, Having for a Period of Sixteen Months After the Expiration of the Period of Redemption Taken No Steps to Redeem, is Precluded from Maintaining This Action by Reason of Laches.**

Raised by answer, paragraph XXVI (erroneously "XVI") (74); interlocutory decree, paragraph twelfth (378); and Assignments of Error 21 and 22 (520).

Section 702 of the Code of Civil Procedure of the state of California provides that the judgment debtor

or redemptioner may redeem the property from the purchaser within twelve months after the sale, and section 707 of the said code fixes the period of time within which the purchaser is to present his verified statement of account in case of demand for the same on the part of the judgment debtor or redemptioner. The period of time specified by said statute of California is one month from and after such demand; and the above-cited section 707 further prescribes that if such purchaser "fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction to compel an accounting \* \* \*" In accordance with these statutory provisions the time for redemption or for bringing an action to enforce the right of redemption is at the most fixed for one year and one month. The code does not specify the particular time within which an action for accounting is to be brought upon refusal of the purchaser to give such account, but according to the general principle of construction of statutes, it must be conceded that the statute provides that such action should be brought within a reasonable time, having in view the condition of the purchasers' estate which remains unsettled until the expiration of the statutory time to redeem. In this case, as discussed *supra*, a paper purporting to be a demand for an account was presented to appellant March 1, 1918, two days before the expiration of the statutory time. This complainant, who made said demand, was notified in writing as early as January 29, 1918, over one month

prior to said demand, by the attorney for appellant (see Plaintiff's Exhibit 13, Tr. p. 581), that appellant required evidence of the legal authority of the party seeking to redeem. Complainant was further notified by this writing that when said evidence was furnished he would be given the requisite statement as to rents and profits. No such authority was ever furnished, but a demand, signed by the complainant in three different capacities, to-wit, individually, as trustee for the Pacific Crude Oil Company, and as attorney for said company, was on March 1st delivered to appellant.

In *Lynch v. Burt*, 132 Fed. 417, the redemptioner paid into the court the full amount apparently necessary to the redemption, on the last day of the statutory period prescribed for redemption, and secured at the same time a restraining order restraining the purchaser from applying to the sheriff for a deed. The Circuit Court of Appeals for the 8th Circuit holding that the deposit of money as made was not sufficient to satisfy the requirements of the statute in reference to redemption, and that the same was manifestly made for the purpose of extending the statutory period of time, said, at pages 429-30:

“In the absence of statutory provision therefor, there is no right of redemption from execution sales, and it logically follows that the extent or the measure of the right is found in the statutory terms prescribing the time and method

of its exercise and designating the persons who may exercise it. \* \* \*

“In denying a claim to redeem after the expiration of the prescribed time, where the debtor was prevented from redeeming during that time by an unavoidable and distressing illness which incapacitated him from considering or attending to business affairs, Mr. Justice Campbell said, in *Cameron v. Adams*, 31 Mich. 426: ‘Courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end, but we think there is no such power to relieve against statutory forfeitures. Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited and there has been no fraud in conducting the legal measures no court can interpose objections or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law. This principle has not been open to controversy and is familiar and elementary.’

“These cases but state the general rule, which rests upon the want of power in courts of equity to enlarge or extend a right which they were powerless to create, their duty to yield obedience to the direct expression of the legislative will, and the manifest justice in requiring a debtor who, as a matter of grace, is granted the statutory period within which to save his land, to exercise the right within the time and in the manner prescribed. Time is of the essence of the conditions upon which the right is granted.

“While substantially acceding to the statement of the general rule just made counsel urged that a redemption was effected by the payment of the requisite amount into the court below under the circumstances heretofore recited, and also that this case comes within the general authority of courts of equity to relieve against fraud. We have no doubt that a statutory right of redemption may be enforced through a bill in equity *seasonably* brought in instances where the exercise of the right in conformity with the statutory requirements is wrongfully denied, obstructed, or prevented, or where, before the right can be properly exercised, it is necessary to determine by judicial proceedings in whom the right rests, from whom the redemption must be made, or the amount requisite to effect it; but a careful consideration of the facts of the present case demonstrates that it is not one for equitable intervention.” (The italics ours.)

As heretofore stated, complainant had over one month's notice of the fact that he would be required to show the authority to redeem. He had plenty of opportunity to satisfy this requirement, even, if necessary, going to the state of Delaware and procuring a proper evidence thereof from the judgment debtor. He made no such effort. The evidence shows that nothing whatever was done either by complainant or the judgment debtor, other than the preparation and service of said alleged demand, for the purpose of protecting or enforcing the right of redemption, until July 2, 1919, when this suit was commenced, thus al-

lowing to lapse a period of over fifteen months after the statutory period of redemption had expired, or in other words, a period of three months in excess of the statutory period itself. During this period both complainant and the judgment debtor allowed this appellant to continue the operations on the property; to construct new and useful improvements, and make needed repairs thereon; and had personal knowledge of the pendency and prosecution of the proceedings in the Superior Court of Ventura county, which resulted in the issuance of a writ of mandate against the sheriff compelling the issuance and delivery of his deed to appellant as the purchaser at the execution sale. As heretofore stated, the record is entirely silent as to any objections being made by complainant or by the judgment debtor against appellant's possession or occupation of the property. No attempt was made by complainant or the judgment debtor to intervene in said mandate proceedings; indeed, it appears directly from the complainant's letters written to the attorneys for the sheriff in said proceeding that complainant *intentionally* refrained from appearing, either in his own person or as trustee, or as attorney for the judgment debtor, in this mandate proceeding. In and by his letter of date March 30, 1918 (587) he states positively: "I certainly will not appear at its hearing," which refers to the hearing of said mandate proceeding set for the following Monday, April 1st. It appears from paragraph eighteenth of the complaint (18, 19), which is admitted by the answer, that the par-

ticular mandate proceeding in which the peremptory writ ordering the issuance of the deed was made and entered was commenced July 23, 1918, and that the judgment therein was not rendered or entered until August 29, 1918. It will thus be seen that the excuse given by complainant in his letter, Defendant's Exhibit A (582, at 586), that he did not feel justified in appearing in court on the motion in the original mandamus proceeding "because such motion might appear to give jurisdiction which at this moment I cannot do" was no excuse for his failure to appear at some time prior to August 29, 1918, some three months thereafter. There is nothing presented to the court showing or tending to show that complainant did not sleep on his rights, if any he has in the premises. Much less were the acts and conduct of the complainant, as evidenced by his letters, of such a nature as could appeal to the equity of the Court. The complainant seeks in this action a relief which can only be granted in extreme cases of fraud or in which the complainant himself has with due diligence prosecuted his claim. It will not do to say that plaintiff was sufficiently diligent and did all the law required of him under these circumstances by appearing in court at Ventura as *amicus curiae* on the hearing of the first mandate proceeding (testimony of Cochran, Tr. 117, 118). It is true that neither complainant nor the judgment debtor were parties of record to that proceeding, but the judgment debtor was the *real party in interest*, and the party most vitally concerned with

the issues then pending before the Superior Court. Why did not complainant or the judgment debtor intervene or seek to intervene in that proceeding; why did they not intervene or seek to intervene or become a party to the second proceeding in mandate? If either complainant or the judgment debtor had any reasonable grounds for not appearing in either of said proceedings in the said court, why, then, did they wait until July 2, 1919, before bringing any action in any court? It will not do to say that complainant was ignorant of what proceedings were required in order to entitle him or the judgment debtor to be heard in said proceeding. Ignorance of the law is no man's excuse, and, besides, plaintiff was an attorney at law, representing the judgment debtor as such in the state of California, having been retained for that specific purpose. It is to be presumed that plaintiff, as such attorney, knew the necessary procedure of the state of California in the premises. This conduct, under the circumstances, certainly amounted to laches.

In *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, at 696, 42 L. Ed 626, at 630, the Supreme Court, quoting with approval from the previous decision of *Speidel v. Henrici*, 120 U. S. 377-387, 30 L. Ed. 3018, 3019, said:

“ ‘Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them. ‘A court of equity,’ said Lord Camden, ‘has always refused its aid to stale demands where the party slept

upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing. Laches and neglect are allways discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.’ ”

### POINT 9.

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The Interlocutory Decree Rendered Herein in Its Terms Is Inconsistent With the Master’s Report, as Well as With the Final Decree Confirming the Same. The Latter Confers Upon the Pacific Crude Oil Company, and the Complainant as Its Assignee, the Right to Redeem, While the Interlocutory Decree Specifically Declares That the Pacific Crude Oil Company Has Not and Never Had Any Right, Title or Interest in Said Property. If This Be True, It Never Possessed the Right to Redeem, and Therefore Could Assign No Such Right.

Based upon interlocutory decree, paragraph sixth (374); paragraph fifth (374); final decree, paragraph first (498-9); assignments of error 8, 9, 10 (516-517).

We insist and maintain that our position taken in points 1 and 2, *supra*, of this brief, namely, that at the time of the levy and sale under the execution the Pacific Crude Oil Company was the owner of the

complete equitable title or the equivalent to an entire beneficial ownership of the property, is correct, and that this appellant, as a purchaser at said sale, acquired such title and ownership, and that Cochran, as the resulting trustee, held merely the naked legal title, with no beneficial interest in the property. If, however, we are wrong in this contention, and the court below was correct in its holding in the interlocutory decree (374) that the said judgment debtor “neither had nor possessed any estate or any interest in the said real property,” but had and possessed only the right to enforce the trust as against the trustee, then we say that the final decree herein cannot stand. The complainant, as assignee of the Pacific Crude Oil Company, by the alleged assignment could acquire no greater rights than possessed by the assignor. The vital thing sought by this action is the redemption of the property. The effect of the redemption by the judgment debtor is that “he is restored to his estate.” (Code of Civil Procedure, Sec. 703.) If such debtor never had any estate in the property, how is it possible for him to be restored thereto? The master, in and by his report, holds that this appellant, as the purchaser, must account for the rents and profits to the judgment debtor or his assignee of the right of redemption, notwithstanding his report is based on the interlocutory decree, which finds that such judgment debtor never had any interest in the property. The final decree, confirming the report of the master, grants the relief prayed herein, holding “that the right

of redemption exists in favor of the complainant.” The final decree, therefore, is wholly inconsistent with the essential holding embodied in the interlocutory decree, and either one or the other must necessarily be erroneous.

### POINT 10.

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**The Intervention of William H. Cochran as Trustee Was Improperly Allowed and This Allowance Was Ineffectual for Any Purpose:**

**A—The Intervention Came Too Late.**

**B—No Sufficient Opportunity Given Appellant to Answer Complaint and Intervention.**

**C—If Any Issues Raised Thereby Appellant Entitled to Trial by Jury Thereon.**

**D—In Any Event the Intervenor Had No Interest in the Subject Matter of This Action.**

Based upon petition to intervene (473), order granting leave to interven (494), objections of defendant to petition to intervene (487), exceptions of defendants to intervention and final decree, (see stipulation, paragraph fourth (652-653); and final decree (498); assignments of error, 60 and 61 (531).

The petition for leave to intervene was filed by William H. Cochran as trustee on the 17th day of November, 1920 (487), nearly seven months after the rendition of the interlocutory decree herein and after the cause was set down for settlement of the report

of the special master and the final decree. The intervention, therefore, came too late.

Section 387 of the Code of Civil Procedure of the State of California reads in part:

“At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. \* \* \*

In *Hibernian Savings & Loan Society v. Churchill*, 128 Cal. 633, 636, the Supreme Court of California construing said section of the Code of Civil Procedure held that in view of the express language of said statute to the effect that an intervention can take place only “before the trial,” no intervention is permissible after trial or entry of default. The court said there:

“It is the general rule that an intervention will not be allowed when it would retard the principal suit, or require a re-opening of the case for further evidence, or delay the trial of the action, or change the position of the original parties. (*Van Gorden v. Ormsby*, 55 Iowa, 664; *Boyd v. Heine*, 41 La. Ann. 393; *Ragland v. Wisrock*, 61 Tex. 391; *Cahn v. Ford*, 42 La. Ann. 965; *Mayer v. Stahr*, 35 La. Ann. 57.) In order to prevent the intrusion of strangers after the issues between the original parties have been determined, our code expressly provides that an intervention must be ‘before the trial.’”

In *Seligman v. City of Santa Rosa*, 81 Fed. 524, 525, the Circuit Court ~~of Appeals for this Circuit~~ ap-

plied the above quoted section of the California Code of Civil Procedure to a case wherein the trial had terminated at the time the application for intervention was filed. This court holding that said application came too late used the following language:

“The motion to intervene was opposed by the complainants upon the grounds: First, because the motion came too late. Section 387 of the Code of Civil Procedure of this state provides that: ‘Any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation, in the success in either of the parties, or an interest against both.’ It was contended, on behalf of the complainants in this case, that when this motion was made to intervene the trial had not only commenced, but it had ended by the submission of the case on bill and answer. There was nothing left for the parties to do in presenting the controversy to the court for its determination, and it only remained for the court to enter its judgment. I think this is the correct view to be taken of this motion. It came too late to be entertained as presenting any issue for the judgment of the court. Any other practice would lead to confusion or uncertainty.”

In the case at bar the order granting leave to intervene was made on the 30th day of November, 1920 (494), and the final decree was rendered on the following day, to-wit, the first day of December, 1920 (507). No issue presented by the intervention was heard or tried by the court and the effect of the order granting William H. Cochran as trustee the right to

intervene merely was to continue the rendition of the final decree for the following day. Simultaneously the court made an order requiring appellant to answer the petition of intervention within one day, to-wit, not later than 10:00 o'clock A. M. of the first day of December, 1920 (497). The petition for intervention contained thirteen paragraphs and traversed a number of essential matters requiring a detailed answer on the part of appellant and, we respectfully submit, it was an abuse of discretion to allow appellant only one day within which to answer the verbose and lengthy petition of the intervenor.

So, too, the petition of intervention is based upon an alleged trespass of appellant and consequently constitutes in its nature an action at law. Appellant in its objections to the petition for leave to intervene expressly demanded a trial by jury of the issues at law raised by said petition. Paragraph four of said objections reads:

“These defendants, and especially defendant Big Sespe Oil Company, possesses and claims the right to contest and defend against the claims of said petitioner in said proposed intervention, and especially the right to contest and defend against any claim of said petitioner for a money judgment for damages or otherwise, and to have the issues raised by such claim and defense submitted to and passed upon by a jury under the Constitution of the United States, and insists upon and does not waive such right.” (488)

While this suit was one in equity appellant was entitled to a trial by jury of the legal issues presented by the petition for intervention.

In *Rouse v. Hornsby*, 67 Fed. 219, 220, which was also a case in equity, the petition for intervention presented a cause of action at law, and the Circuit Court for the Eighth Circuit held that in such instance it should be treated as an action at law and is properly tried by jury. It is said there:

“While the intervening petition was filed in a chancery suit, it had no relation to any equitable issue in that case, and presented only a cause of action at law, which the Court very properly impaneled a jury to try. For all practical purposes, it was an action at law against the receivers, and the Circuit Court did right in treating it as such.”

Moreover, the intervenor William H. Cochran as trustee had no beneficial interest in the subject matter of this suit, as it is specifically pointed out in Point 1 of this brief, and possessed only the naked legal title holding the same for the Pacific Crude Oil Company which paid the consideration for the property in question. The reason for and object of said intervention was expressed in the petition for intervention as follows:

“\* \* \* this Honorable Court is reconsidering the advisability of making any final disposition of these surplus profits, without first hearing the aforesaid trustee, your petitioner relative thereto.  
\* \* \*” (481)

In other words the purpose of the intervention was to determine the disposition of the alleged surplus profits. And yet the petitioner in the same petition for leave to intervene expressly concedes that he has no interest in the profits accounted for. It is alleged in paragraph twelfth of said petition that “your petitioner thus admits and concedes that, ‘as trustee,’ he has no interest in, nor ownership of the profits which have been accounted for in this suit, by the defendant, Big Sespe Oil Company.” (485) Hence, the intervenor under no circumstances had any interest in the subject matter of this suit and it was error to permit William H. Cochran as trustee to intervene herein.

#### POINT 11.

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**The Court Erred in Restraining Appellant From Claiming Any Right or Interest in Certain Personal Property Belonging to Appellant and From Removing Said Personal Property From the Real Property Involved in This Action.**

Based upon final decree, paragraphs seventh (501) and eighth (502); and assignments of error (55 to 58 inc.) (529, 530).

The lower court, in and by its final decree (paragraphs seventh and eighth) (501, 502), perpetually enjoined appellant from asserting any claim of right whatsoever to the personal property, machinery and equipment situated in or upon the real property in-

volved in the action. This portion of the decree has nothing in the record to support it. The pleadings make no mention of personal property. The ownership of the personal property was not, nor was the right to the possession thereof, an issue in the case. This portion of the decree was therefore erroneous.

There was evidence before the special master showing that considerable personal property was purchased for use on this property by this appellant during its occupation thereof and that this personal property still remained loose and detached on the real property at the time of the master's report. For instance, the master (445) expressly finds that appellant in 1919, at a cost of some \$75, placed a gauging tank on the property. Appellant was denied a credit for this amount and by the final decree it is enjoined from asserting any claim of ownership thereto. In this connection, it seems appropriate to again remind the court that complainant never had nor possessed any ownership of or right to the possession of any personal property in connection with the said real property. The sole source of any claim to right of ownership or possession in or to any property is said alleged assignment from the judgment debtor (Complainant's Exhibit 8) (569), which, as hereinbefore shown, does not even purport to assign to complainant anything more than the naked right to redeem the real property.

POINT 12.

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The Court Erred in That Portion of the Final Decree Ordering Appellant to Deposit in Court the Sum \$3,843.84, Together With Interest Thereon, as the Alleged Surplus of Profits Over Amount Required to Redeem. Upon a Proper Accounting There Was No Surplus and There Was No Party Before the Court Who Was Entitled to Any Surplus.

Based upon exceptions to master's report, paragraphs First (463), Fourth to Twelfth inc. (464 to 467 inc.), Fourteenth to Sixteenth inc. (468), Eighteenth (469); order of court approving master's report and denying exceptions (360-361); the final decree and especially paragraphs First to Sixth inc. (498 to 501 inc.); assignments of error, 32 (523) to 38 (524) inc., 41 to 43 inc. (525), 45 (526), 46 (526), 47 (526), 49 and 50 (527), and 53 (528).

We have already, *supra*, under Point 2, discussed to some extent the errors of the master and the court with reference to the allowance and disallowance of interest on the accounting. The master followed the holding of the District Court, in its interlocutory decree (paragraph sixth) (374) (paragraph eighth) (375), to the effect that the Pacific Crude Oil Company had no right, title or interest in or to the property involved in this suit, and that therefore appellant as the purchaser of said interest of the said Pacific

Crude Oil Company acquired no interest in the same or the rents and profits therefrom, and that appellant was a mere trespasser. Basing his report upon this premise, the master concluded that appellant is to account for any and all moneys received by him during the period of redemption, and up to the time of the final decree, and that, on the other hand, no deductions except the sum of \$746.31, paid by appellant for state and county taxes, should be allowed to appellant. Striking the balance of account upon this erroneous, we respectfully submit, basis, the master found that there was a surplus of moneys received by appellant over the deductions allowed in the sum, as finally adjudged in the decree, of \$3,843.84, with interest, making a total of \$3,980.12 (501). It must be borne in mind that the regularity of the proceedings wherein appellant obtained its judgment against the Pacific Crude Oil Company is not questioned, and that the judgment debtor and the complainant, as its assignee of the right of redemption, by attempting to demand an account for the purpose of redemption, and by bringing this suit, concede that the judgment and sale were had and obtained in due course of legal proceedings. Nevertheless, the report and the final decree confirming the same are founded upon the holding and assumption that the judgment creditor receiving the rents and profits from the property purchased by it at execution sale was guilty of a tort and in the eyes of the law was nothing more and nothing less than a trespasser. For the sake of illustration, we might

refer to the position taken by the master, which position is confirmed by the final decree of the court, in reference to the moneys received by the purchaser from the rents and profits of the property. The master (453, 454) in his report charges the purchaser with interest on all proceeds from the sale of oil from the time of their respective payments up to and including the day of the entry of the final decree. In the summary statement of the master (453) the master says:

“Defendant should be charged with the various amounts of money collected and received by it, from the sale of the crude petroleum which it has extracted and sold from the real property involved in this suit; such amounts being as hereinbefore found and stated. And such charges should be respectively made as and of the days of the dates when such moneys were respectively collected and received by defendant, as also hereinbefore found and stated.

“Defendant should also be charged with interest at the rate of seven per cent per annum on these proceeds from the sale of oil, from the time of their several respective payments, up to and including the day of the entry of the final decree herein.”

Section 702 of the Code of Civil Procedure expressly provides that in order to redeem the judgment debtor or redemptioner must pay the purchaser “the amount of his purchase, with one per cent per month *thereon* in addition, *up to the time of redemption.*” The master not only disregarded this statutory pro-

vision in not allowing the purchaser one per cent per month on the amount of the purchase price and allowing interest only on the balance that may be found due under the accounting, but *in addition thereto charges the purchaser with interest on all moneys received by him from the time the same were received as rents or profits from the property up to the time of the entry of the final decree.*

Hereinbefore, under Point 2, we have discussed the matter of the appellant's being denied all credits for expenditures except only state and county taxes. We will not impose upon the time of the Court by a detailed reference to the individual items and the testimony concerning them. But for the purpose of illustrating the point under consideration, and in particular to show the manifest error in that portion of the decree compelling appellant to pay into the court the alleged surplus of \$3,843.84 with interest, we desire to call the Court's attention to one particular phase of said master's report as confirmed by the Court. Under the heading "Operation of the Realty" (429) the master found that there were certain "payments proven to have been made by defendant in the pumping of the wells on this property, and in marketing the oil extracted and produced therefrom" (437). These payments amounted to \$4,422.49, and the master found that they were proper, necessary and reasonable expenses in the premises, and that appellant would have been entitled to credit for these expenses save and except for the sole reason that it was a trespasser,

on which ground alone these credits were denied appellant. Had this one item alone, to say nothing of many others, been allowed as a credit to this appellant, it is impossible to say what precise effect this would have had upon the final result of the accounting, but one thing is absolutely certain, that if said item had been allowed, there would have been no surplus whatever and therefore no judgment against this defendant for \$3,843.84 with interest.

A reference to one other item will be sufficient for the present discussion. The master's report (422), based upon the testimony, finds that on October 4th, 1917, within one year after the sale, a fire swept over the property, totally destroying the derricks, rigs and certain of the equipment of wells Nos. 3 and 4, and also seriously damaging other property. He further finds (422) that defendant, prior to January 7th, 1918, had erected new derricks in the place of those destroyed and had repaired or replaced the pumping equipment. The master's report (439, 440) shows that the defendant incurred expenses for labor, materials and equipment in repairing this destruction and in restoring said wells so that they might produce oil, to the amount of \$1,278.39. Pumping was thereafter continued from these wells, and the entire proceeds received from the operation of said property thereafter, and for which this appellant is compelled to account, came from the operation of these two wells as repaired and restored, yet, strange to say, both the master and the Court deny appellant any credit what-

ever for these expenses, the master stating (440) that these expenses incurred were not “in any legal sense ‘necessary’ repairs on this property”; but, on the contrary, were improvements voluntarily and unnecessarily made.

We have therefore shown under this Point 12 that, independent of the errors in the computation of interest, the result of which cannot be precisely ascertained from the report and the final decree, appellant was at least entitled to two credits, one for \$4,422.49, the other for \$1,278.39, making a total of \$5,700.88, for which it was given no credit whatever, but on the contrary was ordered to pay into court an alleged surplus of \$3,843.84. It goes without saying that various other items of the account could be enumerated showing that the master erred in disallowing credits for expenditures necessarily incurred in the operation of the wells, but in view of the fact that we do not desire to burden this court with an unnecessary discussion of separate items of the account, we deem it improper at this time to go into greater length into the analysis of the master’s report. This is a proper subject for a new accounting.

But, independent of the question of any errors in the master’s report, we submit that that portion of the decree ordering appellant to pay into court this alleged surplus was entirely erroneous because and for the reason that there was no party to this action who, under any circumstances, had the right to recover any surplus from this appellant. We have already, at the close of the discussion under Point 10, *supra*, page

104, shown to the court that William H. Cochran, as trustee, not only had no right to claim any surplus, but expressly disclaimed any such right. The Pacific Crude Oil Company is not a party to the action and the alleged assignment from said company to complainant, as we have heretofore shown, does not assign, nor does it purport to assign anything but the naked right to redeem.

### Conclusion.

In conclusion, it must be manifest from the foregoing argument that the complainant in this action has utterly failed to make out a case or even to show ground for relief in equity. The complainant had no beneficial interest in the property at the time the same was purchased from the appellant. The initial purchase payment was made by the Pacific Crude Oil Company and conveyance was made in the name of complainant, who thereby became the trustee of a resulting trust. This suit is brought by him upon an alleged assignment for which admittedly he paid no consideration other than services claimed to have been rendered to the Pacific Crude Oil Company. This assignment was made to and accepted by complainant some fifteen months after the right of redemption had expired and after this appellant had, to the knowledge and with the acquiescence of complainant, operated this property for a period of over two years, during all of which time it had been continuously under great expense in the operation of said property and in the

construction of improvements and repairs thereon to the knowledge and without any objection from this complainant. The assignment was also made after the Pacific Crude Oil Company had forfeited its charter and was, to all appearances, a defunct corporation.

On the other hand, it is not disputed in the case that the judgment of appellant against the Pacific Crude Oil Company was duly made and rendered and that all subsequent proceedings in reference to the sale of the property were regular. The appellant, as the purchaser at the sheriff's sale, thereupon entered into possession of the property and continued in such possession without interruption, or any step on the part of the judgment debtor to redeem the same. Over one month prior to the expiration of the statutory period for redemption appellant, evidently becoming aware of the fact that the Pacific Crude Oil Company had forfeited its charter, informed William H. Cochran, who represented, or claimed to represent, the Pacific Crude Oil Company in California, that in order to redeem it would be necessary to furnish proof that the party desiring to redeem was entitled to do so, and further informed him that as soon as such proof was furnished appellant it would give a statement of the rents and profits. No such authority was furnished, and a demand for a verified statement of account was made two days prior to the expiration of the full statutory period for redemption. Thereafter, for the period of one year and three months, nothing was done by the judgment debtor or anyone else in its behalf by

way of taking steps to overcome the effect of the expiration of the time to redeem. The complainant had full knowledge of the fact that, several months after the expiration of the time for redemption, appellant instituted mandamus proceedings for the purpose of directing the sheriff to issue a deed to the purchaser. Complainant intentionally refrained, either individually or for the judgment debtor, from becoming a party to these proceedings, and also refrained from instituting any affirmative action to protect or enforce the right of redemption. And this, notwithstanding the fact (if the allegations of plaintiff's verified bill of complaint herein are true) that he was fully conversant with all of the phases of said mandamus proceedings and knew that they were initiated and prosecuted in fraud and for the express purpose of deceiving and defrauding the Superior Court of Ventura county into granting this appellant relief to which it was not entitled.

The affirmance of the decree in this cause will result in depriving this appellant of 245 acres of valuable oil-producing lands originally owned by it which was not paid for in full, and of requiring appellant to pay to the alleged assignee of the delinquent debtor the sum of approximately \$4,000.

We respectfully submit that under those circumstances, and for the reasons hereinbefore stated, this decree should be reversed.

DUDLEY W. ROBINSON,  
A. I. McCORMICK,  
*Attorneys for Appellant.*





## APPENDIX.

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### Statutes Referred To.

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#### Code of Civil Procedure.

##### Section 387.

##### *Intervention, When It Takes Place, and How Made.*

At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it within ten days from the service thereof, if served within the county wherein said action is pending, or within thirty days if served elsewhere. (Amendment approved 1907; Stats. 1907, p. 703.)

## Section 700.

*Sale of Real Property. What Purchaser Is Substituted to and Acquires.* Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto on the date of the levy of the execution thereon, where such judgment is not a lien upon such property; if the judgment is a lien upon the real property the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor on or at any time after the day such judgment became a lien on such property; and in case property, real or personal, has been attached in the action, the purchaser is substituted to and acquires all the right, title, interest and claim of the judgment debtor on or at any time after the day the attachment was levied upon such property. (Amendment approved 1907; Stats. 1907, p. 684.)

## Section 700a.

*When Sales Are Absolute. What Certificate Must Show.* Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, and file a duplicate thereof for record in the office of the county recorder of the county, which certificate must state the date of

the judgment under which the sale was made and the names of the parties thereto, and contain:

1. A particular description of the real property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. If the property is subject to redemption, the certificate must so declare, and if the redemption can be effected only in a particular kind of money or currency, that fact must be stated.

#### Section 701.

*Real Property so Sold, by Whom It May Be Redeemed.* Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;
2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are in this chapter termed redemptioners.

#### Section 702.

*When It May Be Redeemed, and Redemption-Money.* The judgment debtor, or redemptioner, may redeem the property from the purchaser any time

within twelve months after the sale on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. And if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made, the amount of such lien with interest. (Amendment approved 1897; Stats. 1897, p. 41.)

### Section 703.

*When Judgment Debtor or Another Redemptioner May Redeem.* If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent thereon

in addition, and the amounts of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the sheriff and a duplicate filed with the recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within twelve months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but, in all cases, the judgment debtor shall have the entire period of twelve months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a cer-

tificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale. (Amendment approved 1897; Stats. 1897, p. 41.)

#### Section 704.

*In Cases of Redemption, to Whom the Payments Are to Be Made.* The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment.

#### Section 705.

*What a Redemptioner Must Do in Order to Redeem.* A redemptioner must produce to the officer or person from whom he seeks to redeem and serve with his notice to the sheriff making the sale, or his successor in office:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed; or, if he redeem upon a mortgage

or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto;

3. An affidavit by himself or his agent, showing the amount then actually due on the lien. (Amendment approved 1909; Stats. 1909, p. 967.)

### Section 706.

*Until the Expiration of Redemption-Time, Court May Restrain Waste on the Property. What Considered Waste.* Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of the sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property.

### Section 707.

*Rents and Profits.* The purchaser from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption,

is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption-money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns, to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

#### Section 1971.

*Transfer of Real Property to Be in Writing.* No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered,

or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.

## Civil Code of California.

### Section 847.

*What Uses and Trusts May Exist.* Uses and trusts in relation to real property are those only which are specified in this title.

### Section 852.

*Trust Must Be in Writing.* No trust in relation to real property is valid unless created or declared:

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;
2. By the instrument under which the trustee claims the estate affected; or
3. By operation of law.

### Section 853.

*Transfer to One for Money Paid by Another.* When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made. (Amendment approved 1874; Code Amds. 1873-74, p. 221.)

### Section 857.

*Purposes of Express Trusts.* Express trusts may be created for any of the following purposes:

1. To sell and convey real property and to hold or reinvest or apply or dispose of the proceeds in accordance with the instrument creating the trust.
2. To mortgage or lease real property for the benefit of annuitants, or devisees or legatees, or other beneficiaries, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of real property, and pay them to, or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term, subject to the rules of title 2 of division 2 of part 1 of this code.
4. To receive the rents and profits of real property and to accumulate the same for the purposes and within the limits prescribed by the same title; or
5. To convey, partition, divide, distribute or allot real property in accordance with the instrument creating the trust, subject to the limitations of the same title.

### Section 863.

*Trustees of Express Trusts to Have Whole Estate.* Except as hereinafter otherwise provided, every express trust in real property, valid as such in its crea-

tion, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

### Section 1624.

*What Contracts Must Be Written.* The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent :

1. An agreement that by its terms is not to be performed within a year from the making thereof ;

### Section 2230.

*Certain Transactions Forbidden.* Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows :

1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so ;
2. When the beneficiary not having capacity to contract, the proper court, upon the like information of the facts, grants the like permission ; or
3. When some of the beneficiaries having capacity to contract, and some not having it, the former grant

permission for themselves, and the proper court for the latter, in the manner above prescribed.

**Section 2235.**

*Presumption Against Trustees.* All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.





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